

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

9 APRIL 2024

VOLUME 2 OF 5



CERTIFICATE OF EXHIBIT:

Form 47, R.435

Filed on behalf of the Applicants

Cowen Schwarz Marschke Lawyers

Level 8, 300 George Street

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VOLUME 2 OF 5

Exhibit "**DW-128**", pages 183 - 364 to the Affidavit of **DAVID WHYTE** sworn this 9th day of
April 2024


Deponent


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

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- 1.2 In this agreement, unless the context otherwise requires:
- (a) words importing one gender include the other genders;
 - (b) the singular includes the plural and vice versa;
 - (c) a reference to a party is a reference also to that party's respective successors or assigns;
 - (d) a reference to a *person* includes an individual, firm, company, corporation or unincorporated body of persons, or any state or government or any agency thereof (in each case, whether or not having separate legal personality) and reference to a *company* includes a person;
 - (e) a reference to an *agent* does not include any pricing service or supplier of pricing information used by Permanent for valuation or pricing purposes;
 - (f) headings are for convenience only and shall not affect interpretation;
 - (g) mentioning anything after, *include*, *includes* or *including* does not limit what else may be included;
 - (h) references to sections, clauses and schedules are references to sections, clauses and schedules of this agreement;
 - (i) a reference to Permanent or the Client includes, where the context permits a reference to their respective officers, employees and agents or any of them;
 - (j) a reference to the *knowledge, belief or awareness* of any person in relation to a matter means the knowledge, belief or awareness that the person would have if they had made all reasonable enquiries of others who could reasonably be expected to have information relevant to the matter and, where those enquiries would have prompted a reasonable person to make further enquiries, made those further enquiries;
 - (k) a reference to any legislation or to any provision of any legislation includes any modification or re-enactment of it, any legislative provision substituted for it and all regulations and statutory instruments issued relating to it;
 - (l) references to dollar and '\$' refer to amounts in Australian currency; and
 - (m) the schedules to this agreement form part of this agreement.

2. APPOINTMENT OF PERMANENT

- 2.1 The Client appoints Permanent to provide custodial services on the terms of this agreement.
- 2.2 Permanent accepts its appointment and agrees to provide custodial services to the Client on the terms of this agreement.
- 2.3 Permanent acknowledges that the Client will assess Permanent's performance on a regular basis in accordance with the methods and standards identified in schedule 3.

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3. FUNCTION AND POWERS OF PERMANENT

- 3.1 Subject to the provisions of this agreement, Permanent agrees to custodially hold the Portfolio and Title Documents as agent for the Client in relation to each Scheme.
- 3.2 The Client authorises Permanent to:
- (a) purchase, acquire, issue, release, sell or dispose of property to form or forming part or all of any Portfolio on receipt of Instructions from the Client and execute all transfers, releases, and assurances and other documents necessary for any such purpose;
 - (b) receive and hold or procure the receipt and holding of any property so purchased or acquired and any interest, dividend, rent or other income accruing in respect of it and any document of title to it in safe custody;
 - (c) procure safe custody of property of the Portfolio in bearer form;
 - (d) procure registration in the name of Permanent or of a Sub-custodian, as the case requires, of property of the Portfolio in a registrable form unless it is otherwise impractical or inconsistent with market practice or otherwise permitted with the consent of the Client; and
 - (e) provide the custody services and other administrative services as set out in this agreement or as agreed from time to time between Permanent and the Client. In such circumstances Permanent is entitled to receive additional fees as agreed between the parties.
- 3.3 Permanent may establish an account in the name of the Client designating a Scheme or, if otherwise instructed by the Client, some other name, with any bank or company approved by the Client and operate on the account in accordance with Instructions from the Client.
- 3.4 Permanent may refuse to purchase, acquire, issue, release, sell, accept the deposit or transfer of a security, document or other property, and the Client must accept a return of the document or transfer of the security or other property at the request of Permanent. In particular, Permanent has no obligation to accept into the Portfolio or acquire any partly paid investment unless the Client has made arrangements satisfactory to Permanent to set aside in the name of Permanent money or other property sufficient to provide for payment of the investment in full.
- 3.5 The Client agrees that, in relation to property held on a pooled basis or in an omnibus account, the transfer or delivery of property in accordance with this agreement of the same type and number as the property so held will constitute a proper performance by Permanent of its obligations under this agreement.
- 3.6 Permanent may execute or make on behalf of the Client any certificates, declarations or affidavits which are required to receive into or transfer out of its custody any property of or for any Portfolio.
- 3.7 The Client agrees that Permanent or any Sub-custodian may hold any property included in a Portfolio on a pooled basis or in an omnibus account in accordance with any class order issued by ASIC or any specific relief from the requirements of section 601FC(1)(i) of the Law granted by ASIC in relation to the relevant Scheme.

- 3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.
- 3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.
- 3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.
- 3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESSE, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.
- 3.12 Permanent is authorised to comply with any obligations imposed on it by law.
- 3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.
- 3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.

4. DUTIES OF PERMANENT

- 4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.
- 4.2 Permanent must promptly forward to or notify the Client or the relevant Manager of all forms of proxy, notices of meetings and other material letters, notices or announcements received by Permanent relating to the assets of a Portfolio.
- 4.3 Permanent is not responsible for reviewing or advising the Client on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by the Client.
- 4.4 Permanent disclaims any knowledge of the terms on which securities are issued or the constituent documents of the issuer and the Client undertakes to investigate and satisfy itself as to those matters and to ensure that any Instructions to Permanent are in conformity and reasonable having regard to them.

- 4.5 Permanent is not responsible for the accuracy or completeness of any information received from third parties and passed to or assessed by the Client or a Manager.
- 4.6 Permanent is not obliged to institute or defend legal proceedings unless requested by the Client and indemnified by the Client to its satisfaction.
- 4.7 The services of Permanent under this agreement are not exclusive. Permanent is free to provide similar services to others, and is not obliged to disclose to the Client anything which comes to its notice in the course of providing services to others or otherwise than in the performance of this agreement.
- 4.8 Permanent is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.
- 4.9 To the extent required by section 601FC(1)(i) of the Law as modified by any relief granted by ASIC, Permanent shall ensure that the assets of each Portfolio are:
- (a) clearly identified as property of the respective Scheme; and
 - (b) held separately from Permanent's own assets, the assets of any other Scheme or any other assets held by Permanent in any other capacity whatsoever.
- 4.10 Permanent is not responsible for checking or ascertaining the value of any property or whether the price to be paid for any property is proper or reasonable or whether any transaction which it is instructed to effect accords with the constitution, compliance requirements, prospectus, investment policy or limit for the time being established for or in force in relation to the Scheme.
- 4.11 Permanent must notify the Client in writing immediately if Permanent becomes aware that it no longer satisfies the requirements of ASIC Policy Statement 131 or 133.
- 4.12 Permanent must provide to the Client at least annually at a time as agreed between the parties a certificate signed by two directors stating that Permanent has met the requirements of ASIC Policy Statements 131 and 133 during that financial year and must (if the Client reasonably requires such certificate) also provide annually at a time as agreed between the parties a certificate signed by Permanent's external auditor confirming that, in the auditor's opinion, Permanent continues to meet the financial requirements of ASIC Policy Statements 131 and 133.
- 4.13 Subject to clause 4.15, Permanent must not take a charge, mortgage, lien or other encumbrance over, or in relation to, the assets of a Scheme other than in respect of expenses and outlays made within the terms of this agreement.
- 4.14 Permanent must not exercise any right in the nature of a charge, mortgage, lien, or other encumbrance over or in relation to assets of the Scheme in relation to unpaid custodian fees pursuant to clause 8.1, but otherwise Permanent is entitled to exercise any rights in relation to the assets of the Scheme available to it at law in the nature of a charge, mortgage, lien or other encumbrance and is additionally granted by this agreement rights of lien and set off as against the assets of a Portfolio in relation to any liability, loss, cost, claim or expense incurred or arising on account of the Scheme in the proper performance of Permanent's powers or duties under this agreement. In the exercise of rights pursuant to this clause Permanent may sell any

asset from the relevant Portfolio and enforce its rights under this agreement against the proceeds of such sale.

- 4.15 If Permanent receives Instructions to take a charge, mortgage, lien or other encumbrance over or in relation to any assets in a Portfolio, Permanent need only act on those Instructions if it is satisfied that its liability pursuant to such charge, mortgage, lien or encumbrance is limited to the assets available to it pursuant to this agreement.
- 4.16 If the Client instructs Permanent to Custodially Hold any real property pursuant to this agreement, Permanent need not agree to do so unless Permanent is satisfied that its liabilities in relation to the holding of such real property are limited to the assets available to it pursuant to this agreement. In this regard, Permanent may require the Client to effect and maintain insurances identified by Permanent in Permanent's name or to provide additional indemnities to Permanent.
- 4.17 In the event that Permanent has breached a term of this agreement which entitles the Client to exercise rights against Permanent, the existence of such rights does not entitle the Client to prevent Permanent from relying on the provisions of this agreement to seek indemnification or other rights in order to meet or satisfy any claim or demand made by a third party on Permanent.
- 4.18 Permanent agrees to compensate a Scheme by making a payment to that Scheme in the event of Permanent being required by law to make such payment if there is a loss to a Scheme as a result of Permanent failing in its obligations under this agreement.

5. INSTRUCTIONS

- 5.1 Permanent is authorised to act, or to cause any other person to act, on any Instructions given to it in accordance with this clause 5.
- 5.2 Permanent is authorised to act on Instructions in writing which bear or purport to bear the signature or a facsimile of the signature of any of the Client's Authorised Persons or Instructions provided by electronic means using security codes or procedures agreed between Permanent and the Client.
- 5.3 Permanent is not liable for acting on any Instructions which appear to it to have been properly and regularly signed or given and is under no duty to inquire whether any such Instructions have been so signed or given. However, Permanent may require written confirmation from the Client before acting on any Instructions.
- 5.4 Permanent is not liable for acting on any Instructions given in accordance with this clause 5 which contain any error or ambiguity.
- 5.5 Nothing in this clause 5 obliges Permanent to obtain Instructions where the other provisions of this agreement do not impose any such obligation.
- 5.6 Permanent may record electronically telephonic discussions relating to this agreement or any transaction effected under it with the prior consent of the Client for each discussion intended to be recorded.

6. SUB-CUSTODIANS

- 6.1 Permanent may, where it considers their appointment necessary or desirable for the purpose of exercising its powers or performing its duties under this agreement, appoint Sub-custodians (including any person related to or associated with Permanent) to perform any of its duties under this agreement with any or all of its powers under this agreement, including this power of delegation, and any delegate appointed by the exercise of such power shall be included in the term Sub-custodian. Any appointment of a Sub-custodian by Permanent is not an assignment of Permanent's rights or obligations under this agreement.
- 6.2 Permanent must supply to the Client on request a description of property included in the Portfolio which is held by or registered in the name of a Sub-custodian, together with the name and address of the Sub-custodian.
- 6.3 Permanent shall be responsible for the actions and omissions of its Sub-custodian appointed by Permanent pursuant to clause 6.1.

7. BOOKS, RECORDS AND STATEMENTS

Permanent must:

- (a) properly maintain adequate books and records, accounts of all receipts, disbursements and other transactions relating to the Portfolio in accordance with generally accepted accounting principles to the extent such principles are relevant;
- (b) provide the Client with the reports and statements relating to the Portfolio described in schedule 4 at the intervals mentioned in schedule 4; and
- (c) provide any auditor of the Client with any reasonably available information in Permanent's possession about the Portfolio which the auditor requires to enable it to perform any audit or investigation involving the Portfolio.

8. FEES AND EXPENSES

- 8.1 The Client agrees to pay to Permanent during the continuance of this agreement fees in the amounts described and at the time set out in schedule 5.
- 8.2 Permanent is entitled to recover from the Client the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs (including fees and other amounts payable to Sub-custodians) in connection with the performance of its duties and the exercise of its powers under this agreement including, without limitation, settlement, delivery, registration and transaction charges and foreign currency costs and charges including any reasonable expenses incurred as a result of the Client requesting a certificate pursuant to clause 4.1.
- 8.3 The Client agrees that Permanent may deduct from any part of a Portfolio any amount payable to Permanent under this clause 8 or any other provision of this agreement and with the consent of the Client, the amounts payable under clause 8.1. The Client authorises Permanent in the name of the Client or Permanent to do any thing (including, but not limited to, executing any document) that is required for that purpose. Permanent agrees to record any such deduction in the records maintained under clause 8.

8.4 All monies owing to Permanent including fees under this agreement accrues from day-to-day.

9. INDEMNITIES AND LIMITATIONS OF LIABILITY

9.1 Without limiting any other indemnity or limitation of liability in this agreement, and without prejudice to any indemnity allowed by law, but subject to this agreement and to any law to the contrary, and to the maximum extent permitted by law, it is agreed and declared that:

- (a) the Client indemnifies Permanent against any liability, demand, loss, costs, Taxes charges and expenses which may be incurred by Permanent in connection with:
 - (i) this agreement and the acts and omissions of Permanent in performing services pursuant to this agreement, except those attributable to the negligence or fraud of Permanent.
 - (ii) all actions, suits, claims and demands which may be brought or threatened against or suffer or sustained by Permanent by reason of Permanent complying with any Instruction by an Authorised Person; and
 - (iii) neglect or fraud on the part of the Client, any Manager or any of their employees, servants or agents.
- (b) Permanent does not incur any liability in respect of any thing done or not done in reliance on any Instruction, notice, resolution, direction, consent, certificate, receipt, affidavit, statement, holding out, certificate for stock, shares or other security, plan or reorganisation, or other document or information which Permanent reasonably believed to be genuine or to have been passed, signed or endorsed by the proper parties, where liability but for this provision would attach because that document or matter was not in fact genuine or so passed, signed or endorsed.
- (c) Permanent does not incur any liability in respect of any failure to do any thing which, because of any present or future law or of any order or judgement of any court, it is hindered, prevented or forbidden from doing.
- (d) Permanent will not be responsible or have any liability for any obligations imposed on the Client, a Scheme or Permanent as custodian of the Portfolio or any transaction under this agreement by the tax law of Australia or any State or Territory of Australia. Permanent will be kept indemnified by and be without liability to the Client for any such obligations including Taxes (but excluding any income taxes assessable in respect of compensation paid to Permanent pursuant to this agreement), withholding, certification and reporting requirements, claims for exemption or refund, additions for late payment, interest, penalties and other expenses (including legal expenses) that may be assessed against the Client, a Scheme or Permanent as custodian of the Portfolio except those attributable to the negligence or fraud of Permanent.
- (e) Permanent may act on the opinion or advice of, statements of or information obtained from barristers, solicitors, bankers, accountants, brokers or other persons believed by it in good faith and on reasonable grounds to be expert in relation to the matters on which they are consulted (whether they are instructed by the Client, Permanent or a third party), and Permanent is not liable for anything done or not done by it in good faith in reliance on that opinion, advice, statements or information.

- (f) where Permanent relies in good faith on any opinion, advice, statements or information from any barrister, solicitor or other expert it is not responsible for any misconduct, mistake, oversight, error of judgement, forgetfulness or want of prudence on the part of any such barrister, solicitor or other expert;
- (g) in the event of the liquidation, dissolution or bankruptcy of any person, or if for any other reason it becomes impossible or impracticable to carry out the provisions of this agreement in respect of that person or otherwise, Permanent is not liable for anything done or not done by Permanent, where Permanent has acted in good faith;
- (h) Permanent is entitled to rely on statements or information from the Client or Manager as to the validity of any signature on any transfer, form of application, request or other document which Permanent reasonably believed to be genuine;
- (i) Permanent is not responsible for the loss of any property during transmission between the Client or a Manager and Permanent or Permanent and a third party or fraud on the Client by a third party, nor for the corruption or loss of any data that is transmitted electronically or to which access is given by Permanent to the Client or a Manager or vice versa;
- (j) Permanent is not liable for any act or omission that is believed by Permanent to be in accordance with local market practice;
- (k) Permanent is not liable for the failure of any person to carry out any agreement or obligation on that person's part;
- (l) Notwithstanding any other provision of this agreement, Permanent's liability is limited to the property for the time being comprised in the Portfolio except for a liability arising as a result of Permanent's own negligence or fraud; and
- (m) Permanent, is not liable for any loss, damage or expense suffered or incurred as a result of any delay in executing an Instruction where the delay has occurred as a result of Permanent waiting for the receipt of the written confirmation from the Client pursuant to clause 5.3.

9.2 Permanent is not responsible for insuring the Portfolio or any part of it.

10. WARRANTIES AND UNDERTAKINGS BY CLIENT

10.1 The Client represents and warrants to Permanent that:

- (a) it has the power to enter into and perform this agreement and has obtained all necessary consents to enable it to do so;
- (b) the entry into and performance of this agreement by the Client does not constitute a breach of any obligation (including, but not limited to, any statutory, contractual or fiduciary obligation) or default under any agreement or undertaking by which the Client is bound;
- (c) property transferred or delivered by the Client to Permanent from time to time to form part of a Portfolio will be the property of a Scheme the subject of this agreement and, unless the consent of Permanent is obtained prior to the transfer, free from any mortgage, charge, lien, pledge, encumbrance or other security interest;

- (d) the Client will, at all times during the term of this agreement, hold any licences or approvals required to be held by it under any law governing its activities relating to this agreement and comply with all conditions of any such licence or approval;
- (e) it is the only responsible entity for each Scheme and no action has been taken or is proposed to remove it as responsible entity of any Scheme;
- (f) the copy of each Scheme constitution provided by the Client to Permanent discloses all the terms of each Scheme and it is not in default under the terms of any Scheme constitution or the Law in relation to any Scheme; and
- (g) it has a right to be fully indemnified out of the relevant Scheme's assets in respect of all obligations and liabilities which it incurs under this agreement.

10.2 The Client undertakes:

- (a) to notify Permanent promptly if the Client appoints or terminates the appointment of a Manager;
- (b) to provide Permanent on request with any documents, information or Instructions reasonably required by Permanent to enable it to perform obligations imposed on Permanent under this agreement or by law;
- (c) to perform its obligations pursuant to this agreement as soon as reasonably practicable and in accordance with the requirements of any relevant Scheme's constitution and the Law;
- (d) to give Permanent notice of any communication from any person including ASIC forthwith upon receipt which relates to the possibility or likelihood of the Client being suspended or removed in relation to a Scheme or that affects or might affect Permanent or any of its Sub-custodians in relation to the performance of their obligations or exercise of their powers under this agreement or otherwise;
- (e) to give Permanent prompt notice of any alteration to a Scheme's constitution.

10.3 The Client undertakes on request to provide and certify to Permanent any information in relation to the Client's status or assessability for taxation purposes in any country which is relevant to the performance of this agreement.

10.4 The Client acknowledges that it enters into this agreement both in its individual capacity and in its capacity as responsible entity for each Scheme and all agreements, warranties and obligations of the Client in this agreement bind the Client in both capacities.

10.5 The Client agrees to inform Permanent promptly if:

- (a) the terms of a Scheme are varied;
- (b) there is any change of responsible entity of a Scheme;
- (c) there is any change of status for taxation purposes of a Scheme; or
- (d) when a Scheme is terminated.

11. TERMINATION OF AGREEMENT

- 11.1 Subject to clauses 11.2, 11.3 and 11.4, this agreement shall continue for the minimum term specified in schedule 6 and after the expiry of the minimum term shall continue on the same terms unless terminated by either party upon giving to the other party notice for no less than the notice period specified in schedule 6.
- 11.2 A party may terminate this agreement by notice to the other party: -
- (a) if a receiver or a receiver and manager of the undertaking (or any part) of the other party is appointed either in relation to the capacity in which it acts pursuant to this agreement or where such receiver or receiver and manager is reasonably likely to affect materially such other party's performance pursuant to this agreement, or
 - (b) if the other party:-
 - (i) goes into liquidation (other than for the purposes of a reconstruction or amalgamation on terms previously approved in writing by the other party) either in relation to the capacity in which it acts pursuant to this agreement or where such liquidation is reasonably likely to affect such other party's performance pursuant to this agreement;
 - (ii) is subject to a scheme of compromise or arrangement with its creditors or has an administrator appointed to its affairs either in relation to the capacity in which it acts pursuant to this agreement or where such scheme or administration is reasonably likely to affect such other party's performance pursuant to this agreement;
 - (iii) ceases to carry on business in relation to its activities as responsible entity in relation to a Scheme in the case of the Client (in which case Permanent may terminate this agreement in relation to a Scheme) or as a provider of custodial services in the case of Permanent;
 - (iv) breaches any provision of this agreement in a material respect or fails to observe or perform any representation, warranty, indemnity or undertaking pursuant to this agreement in a material respect **PROVIDED THAT** if the breach or failure is capable of remedy in the reasonable opinion of the party not in default, this agreement may not be terminated unless the party in default is given a period of no less than 14 days within which to remedy the breach or failure and if not remedied within such period the party not in default may terminate this agreement;
 - (v) sells or transfers or makes any agreement for the sale or transfer of its principal business and undertaking, or of a beneficial interest therein, other than to a related body corporate for the purposes of a corporate reconstruction upon at least 7 days' notice to the other party; or
 - (c) by Permanent if ASIC or a Court having jurisdiction makes a written order vesting any property of the Client in relation to any Scheme in ASIC or some other body other than the Client.
- 11.3 The termination of this agreement does not affect any claim which either party may have against the other.

- 11.4 If after two (2) years from the date of execution of this agreement, the Law and/or ASIC Policy Statements are such that the Client is no longer required to engage the services of a custodian for the Schemes, then the Client may terminate this agreement on not less than three (3) months notice in writing to Permanent.
- 11.5 Subject to this agreement, on termination of this agreement Permanent must, at the expense of the Client, promptly transfer, or cause any Sub-custodian to transfer, the assets of the Portfolio, to or according to the Instructions of the Client (subject to any contrary direction given to Permanent which has the lawful effect of overriding this provision), and the Client agrees promptly to accept the transfer or give the necessary Instructions for the transfer of those assets. Permanent must also, at the expense of the Client, promptly deliver or cause any Sub-custodian to deliver, any documents evidencing title to those assets which it is holding, to or according to the Instructions of the Client. Notwithstanding the provisions of this clause, Permanent may retain any assets which it is lawfully permitted to retain in the exercise of its rights under this agreement.
- 11.6 Upon termination of this agreement pursuant to clause 11.2(c), Permanent shall act upon the instructions of ASIC or an entity properly appointed in relation to a Scheme to the exclusion of the rights of the Client and shall deal with the Portfolio and all books, records, or other material held by it in relation thereto in accordance with the instructions of ASIC or such other entity to the exclusion of any orders, requests or directions from the Client.
- 11.7 Notwithstanding any other provision of this agreement, if ASIC or a Court having jurisdiction has made a written order vesting the property of the Client in relation to a Scheme in another person, Permanent may, upon the receipt of notice of such vesting order, disregard any future Instructions of the Client in relation to a Scheme and any existing Instructions of the Client in relation to a Scheme which have not been fully performed and take instructions in relation to any matter affecting a Scheme from ASIC or such other person.

12. COSTS AND STAMP DUTY

- 12.1 The Client shall pay Permanent's reasonable professional costs, including external legal expenses in connection with the preparation, execution and completion of this agreement and of other documentation related to this agreement.
- 12.2 The Client agrees to bear any stamp duty payable or assessed in connection with this agreement and the transfer of any property to Permanent to form part of the Portfolio. The Client must indemnify Permanent on demand against any liability for that stamp duty (including fines and penalties).

13. NOTICES

Any notice under this agreement shall be in writing and:-

- (a) may be sent to the address, or facsimile number set out in schedule 7 or to any other address or facsimile number that either party may specify in writing to the other;
- (b) is taken to have been given or made:-
- (i) (in the case of delivery in person) when delivered to the address set out in schedule 7;
- (ii) (in the case of delivery by post) on the second Business Day after posting; or

- (iii) (in the case of delivery by facsimile) on production of a transmission report by the machine from which the facsimile was sent which indicates that the facsimile was sent in its entirety to the correct number,

but if the notice is taken to have been given or made on a day which is not a Business Day or is later than 5.00pm (local time) it will be taken to have been duly given at the commencement of the next Business Day.

14. EXERCISE OF RIGHTS

A party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy. A single or partial exercise of a right, power or remedy by a party does not prevent a further exercise of that or of any other right, power or remedy. Failure by a party to exercise or delay in exercising a right, power or remedy does not prevent its exercise.

15. NO WAIVER

No failure to exercise or any delay in exercising any right, power or remedy under this agreement operates as a waiver. No single or partial exercise of any right, power or remedy precludes any other or further exercise of that right or any other right, power or remedy.

16. SURVIVAL OF INDEMNITIES

Each indemnity in this agreement is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this agreement.

17. ENFORCEMENT OF INDEMNITIES

It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this agreement.

18. ASSIGNMENT

A party may not assign any of its rights or obligations under this agreement without the prior written consent of the other party.

19. CONFIDENTIALITY

19.1 All information exchanged between the parties under this agreement or during the negotiations preceding this agreement is confidential to the party supplying the information and may not be disclosed to any person except:-

- (a) to employees, legal advisers, auditors and other consultants of either party or its related bodies corporate requiring the information for the purposes of this agreement;
- (b) with the consent of the party who supplied the information;
- (c) if the information is, at the date this agreement is entered into, lawfully in the possession of the recipient of the information through sources other than the party who supplied the information;
- (d) if required for the purposes of implementing transaction, dealing or matter pursuant to this agreement or by law or a stock exchange;

- (e) if required in connection with legal proceedings relating to this agreement; or
- (f) if the information is generally and publicly available other than as a result of breach of confidence by the person receiving the information.

19.2 A party disclosing information under clause 19.1(a) or clause 19.1(b) must use all reasonable endeavours to ensure that persons receiving confidential information from it do not disclose the information except in the circumstances permitted in clause 19.1.

20. FURTHER ASSURANCES

Each party agrees on the request of the other party to do everything reasonably necessary to give effect to this agreement and the transactions contemplated by it (including the execution of documents) and to use all reasonable endeavours to cause relevant third parties to do likewise.

21. FORCE MAJEURE

Where a party is unable, wholly or in part, because of any thing which is not reasonably within its control other than lack of funds ('force majeure') to carry out any obligation under this agreement, and it:

- (a) gives the other party prompt notice of that force majeure with reasonably full particulars and, in so far as known, the probable extent to which it will be unable to perform or be delayed in performing that obligation; and
- (b) uses all reasonable endeavours to remove that force majeure as quickly as possible,

that obligation is suspended so far as it is affected by the continuance of that force majeure. Any obligation to pay money is not excused by force majeure, save for any obligation of Permanent to pay money where Permanent is entitled to an indemnity from the Client under this agreement in relation to the Portfolio and there is insufficient money in the relevant Portfolio to pay such money.

22. ENTIRE AGREEMENT

This agreement contains the entire agreement between the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by them or prior agreement between them with respect to its subject matter.

23. AMENDMENT

This agreement may be amended only by another document signed by both the parties.

24. DISPUTES OR CONFLICTING CLAIMS

24.1 Where there is a dispute between Permanent and the Client in relation to any matter under this agreement, then any party may refer the matter for decision to an independent expert agreed to by the parties, and failing agreement, an independent expert nominated by the President of the Queensland Law Society. The costs incurred in the determination of the matter by the expert (including the costs of the appointment of the expert) shall be borne by the party or parties as determined by the expert. The decision of the expert shall be final and binding on the parties.

- 24.2 If any dispute or conflicting claim is made by any person or persons with respect of any asset Custodially Held, Permanent shall be entitled to refuse to act in respect of that asset until either:
- (a) such dispute or conflicting claim has been finally determined by a court of competent jurisdiction or settled by agreement between conflicting parties, and Permanent has received written evidence satisfactory to it of such determination or agreement; or
 - (b) Permanent has received an indemnity, reasonably satisfactory to it, to hold it harmless from and against any and all loss, liability and expense which Permanent may incur as a result of its actions.

25. SEVERABILITY

Each part of this agreement is severable from the balance of this agreement. If any part of this agreement is illegal, void, invalid or unenforceable, then that will not affect the legality, effectiveness, validity or enforceability of the balance of this agreement.

26. GOVERNING LAW AND JURISDICTION

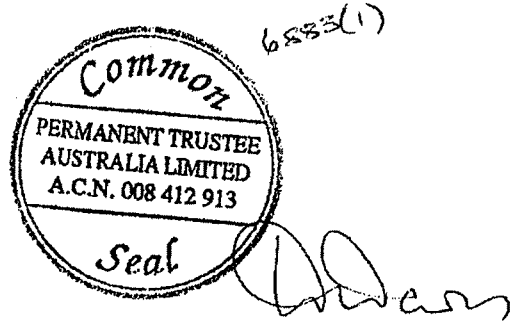
This agreement is governed by the laws of Queensland. The parties submit irrevocably and unconditionally to the non-exclusive jurisdiction of the courts of Queensland and courts of appeal from them in relation to any matter or dispute concerning this agreement or the transactions contemplated by this agreement.

27. COUNTERPARTS

This agreement may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one agreement.

EXECUTED as an agreement.

THE COMMON SEAL of
PERMANENT TRUSTEE AUSTRALIA
LIMITED ACN 008 412 913
is affixed in accordance with
its articles of association in the presence of:

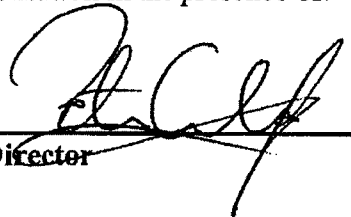


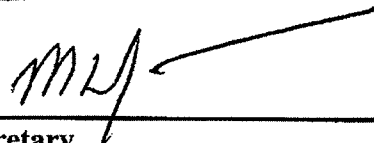

A ~~Director~~ Secretary
Raelene Harrison

A ~~Secretary or appointed person~~ Director
David Davis

THE COMMON SEAL of
LM INVESTMENT MANAGEMENT
LTD ACN 077 208 461
is affixed in accordance with
its constitution in the presence of:




A ~~Director~~


A Secretary
DIRECTOR

SCHEDULE 1

**Authorised Persons
(Clause 1.1)**

Client

The Client's Authorised Persons are each of the group "A" signatories and the group "B" signatories appearing on the attached authorised signatories list dated 18 January 1999 and marked "AA" or such later corresponding lists as may be forwarded by the Client to Permanent from time to time.

The Client will clearly identify instructions to Permanent as either Level 1 or Level 2 instructions.

Level 1 - any "A" signatory together with any "B" signatory are authorised to give Level 1 instructions.





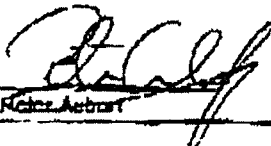



Level 2 - any "B" signatory together with any other "B" signatory are authorised to give Level 2 instructions.

Permanent





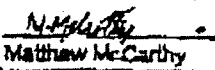

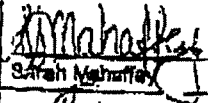

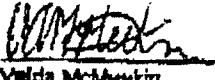





Permanent's Authorised Persons are each of the group "A" attorneys and the group "B" attorneys appearing on the attached specimen signature list dated 23 September 1998 and marked "BB" or such later corresponding lists as may be forwarded by Permanent to the Client from time to time.

AA

Group "A" Signatories

 Peter Drake	 Initials	 Michael Dwyer	 Initials
 Peter Acbar	 Initials	 Adrian Armes	 Initials

Group "B" Signatories

 Jane Burt	 Initials	 Shelley Chalmers	 Initials
 Matthew McCarthy	 Initials	 Sarah Mahaffey	 Initials
 Valda McMarskin	 Initials	 Kylie de Jager	 Initials
 Lisa Jensen	 Initials		



BB

PERMANENT TRUSTEE COMPANY LIMITED
A.C.N. 000 000 993

Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 426 384
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437

THIS LIST OF AUTHORISED SIGNATORIES
IS FOR

A) Operation of Bank Accounts

Authority to operate on a bank account will be as specified in the Authority to Operate held by the bank for the account.

B) Dealings With Inscribed Stock

Any two "A" signatories jointly or any "A" signatory together with any "B" signatory are authorised to sign documentation and give instructions.

C) Signing As An Attorney

Pursuant to Power of Attorney dated 2 June 1993 any two "A" signatories jointly or any "A" signatory together with any "B" signatory, unless otherwise specified, may exercise the power and authorities given by the Power of Attorney.

I, Peter Ham, Company Secretary, certify that this document is a true photographic copy of the specimen signatures of the persons designated pursuant to authority delegated by the Board on 20 October 1993 as signatories and attorneys of Permanent Trustee Company Limited and its subsidiary companies.

Peter Ham, Company Secretary Dated 23 September 1998

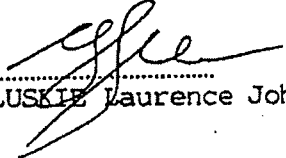
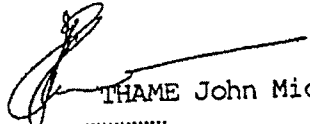
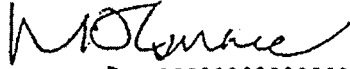

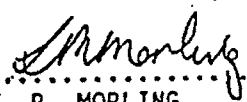




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- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 006 390 317
- Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "A" SIGNATORIES

 GLUSKIE Laurence John	 THAME John Michael
 N.H. GRACE	 C.O.J. STEWART
 T. R. MORLING	 R. B. WILLING
 SAVILLE Duncan Paul	

**THE SIGNATORIES SET OUT IN THIS PAGE
 ARE APPLICABLE ONLY IN RESPECT
 OF THE COMPANIES' BANK ACCOUNTS**

PERMANENT TRUSTEE COMPANY LIMITED

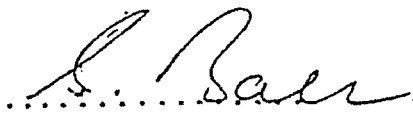

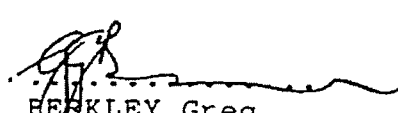

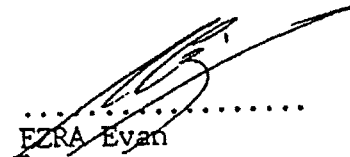

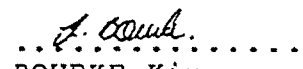
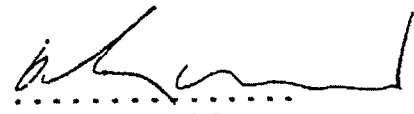
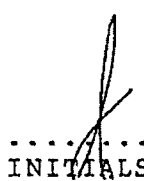
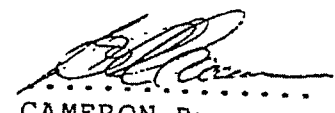
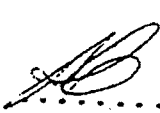




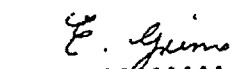








A.C.N. 000 000 993

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- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437



GROUP "A" SIGNATORIES

 BALL Steven	S.B. INITIALS	 DIXON Faye	D INITIALS
 EESKLEY Greg	 INITIALS	 EZRA Evan	 INITIALS
 BOURKE Kim	KB INITIALS	 GAUNT David	 INITIALS
 CAMERON Bruce	 INITIALS	 GEORGE Sandra	 INITIALS
 CUMBERS Helen	 Initials	 GRIME Elaine	 INITIALS
 DANIS Tania	T.K.D. INITIALS	 GUTHRIE Clive	 INITIALS
 DAVIS David	 INITIALS	 HALL John	 INITIALS



Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 634
- Permanent Custodians Limited A.C.N. 001 426 384
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Asst.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 282 573
- Permanent Trustee Company (Carbers) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "A" SIGNATORIES

<p><i>Irene Meyer</i> MEYER Irene</p>	<p><i>I</i> INITIALS</p>	<p><i>Wayne Overall</i> OVERALL Wayne</p>	<p><i>W</i> INITIALS</p>
<p><i>Peter Monahan</i> MONAHAN Peter</p>	<p><i>PM</i> INITIALS</p>	<p><i>Christine Page</i> PAGE Christine</p>	<p><i>CP</i> INITIALS</p>
<p><i>Sean Murphy</i> MURPHY Sean</p>	<p><i>SM</i> INITIALS</p>	<p><i>Giuseppe Polito</i> POLITO Giuseppe</p>	<p><i>GP</i> INITIALS</p>
<p><i>John Newby</i> NEWBY John</p>	<p><i>JN</i> INITIALS</p>	<p><i>Garry Quan</i> QUAN Garry</p>	<p><i>GQ</i> INITIALS</p>
<p><i>Terence Nilon</i> NILON Terence</p>	<p><i>TN</i> INITIALS</p>	<p><i>Devi Raju</i> RAJU Devi</p>	<p><i>DR</i> INITIALS</p>
<p><i>John O'Connell</i> O'CONNELL John</p>	<p><i>JO</i> INITIALS</p>		

A.C.N. 000 000 993

Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 426 384
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Carbers) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437



GROUP "A" SIGNATORIES





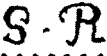


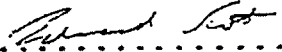





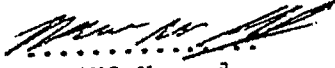

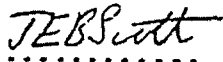

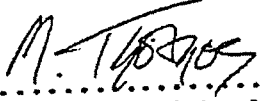

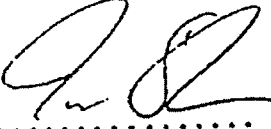

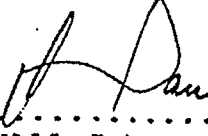
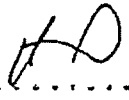
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 HEATHER David	 INITIALS	 LIM Seniwaty	 INITIALS
 HOGAN Andrew	 INITIALS	 MACKRELL Geoffrey	 INITIALS
 ISAACS Ashley	 INITIALS	 McINTOSH Pamela	 INITIALS
 JONES Suzanne	 INITIALS	 MCKASKILL Grant	 INITIALS
 KENNEDY Paul	 INITIALS	 MEAGHER Mark Philip	 INITIALS



Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 426 384
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 006 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437

GROUP "A" SIGNATORIES

 RAPHAEL Stephen	 INITIALS	 SILAVECKY Stenick INITIALS
 RAVI Sai	 Initials	 STEELE Anthony	 INITIALS
 SCOTT Edward	 INITIALS	 STEWART Rodney	 INITIALS
 SCOTT Janine	 INITIALS	 SZEGHO Howard	 INITIALS
 SCOTT Julia	 INITIALS	 TSOTSOS Michael	 Initials
 SHAW Graham Ian	 INITIALS	 WALL John	 INITIALS

A.C.N. 000 000 993

Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 424 384
- Permanent Depository Limited A.C.N. 003 378 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Carberra) Limited A.C.N. 008 390 347
- Rental Housing Custodians Limited A.C.N. 003 284 437



GROUP "A" SIGNATORIES

<p><i>Watson</i> WATSON Christopher Francis Int.</p>	
<p><i>Wellems</i> WELLENS Richard</p> <p><i>W</i> INITIALS</p>	
<p><i>Williams</i> WILLIAMS Guy</p> <p><i>W</i> INITIALS</p>	
<p><i>Williams</i> WILLIAMS Tracy</p> <p><i>W</i> INITIALS</p>	
<p><i>Wong</i> WONG Ivan</p> <p><i>W</i> INITIALS</p>	
<p><i>Wood</i> WOOD Derek</p> <p><i>D.N.</i> INITIALS</p>	

PERMANENT TRUSTEE COMPANY LIMITED

A.C.N. 000 000 993

Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 426 384
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominee (Asst.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Management Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437



GROUP "B" SIGNATORIES

 ANNETTA Michael	 INITIALS	 CARROLL Michael	 INITIALS
 ASSAF Richard	 INITIALS	 CASTLE Rachel Jane	 Initials
 AYRES, Peter James	 INITIALS	 CAUCHI Lucy	 INITIALS
 BEAVERS Jennie	 Initial	 DAVIS Phillip	 INITIALS
 BESTWICK TIM	 INITIALS	 FARRELL Sandra	 INITIALS
 BOYCE Kenneth	 INITIALS	 FIRKIN Joanne	 Int.
 BRADBURY Debra	 INITIALS	 FOULKES John	 INITIALS

A.C.N. 000 000 993



Subsidiary Companies:

- Permanent Registry Limited A.C.N. 000 334 636
- Permanent Custodians Limited A.C.N. 001 426 394
- Permanent Depository Limited A.C.N. 003 278 831
- Permanent Trustee Australia Limited A.C.N. 008 412 913
- Permanent Nominees (Aust.) Limited A.C.N. 000 154 441
- Superannuation Nominees Pty. Limited A.C.N. 000 305 233
- Permanent Property Managers Limited A.C.N. 002 232 573
- Permanent Trustee Company (Canberra) Limited A.C.N. 008 390 387
- Rental Housing Custodians Limited A.C.N. 003 284 437

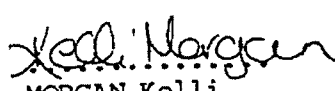
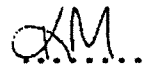


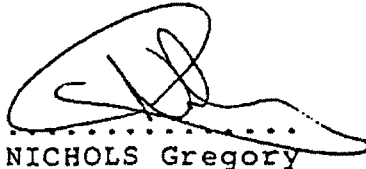

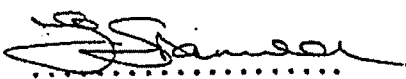
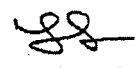
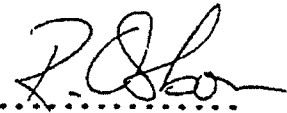

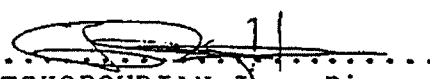
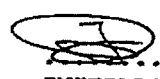
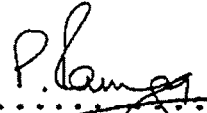





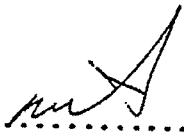



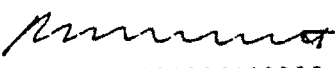

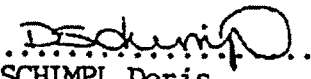

GROUP "B" SIGNATORIES

<p><i>SGS</i> GLOVER Stephen</p> <p><i>SG</i> INITIALS</p>	<p><i>Mandy LU</i> LU Mandy</p> <p><i>ML</i> INITIALS</p>
<p><i>Lindall Hayes</i> HAYES Lindall</p> <p><i>LH</i> INITIALS</p>	<p><i>Bruce Mackie</i> MACKIE Bruce</p> <p><i>BM</i> INITIALS</p>
<p><i>Fiona A Hynard</i> HYNARD Fiona</p> <p><i>FH</i> INITIALS</p>	<p><i>Richard Martin</i> MARTIN Richard</p> <p><i>RM</i> INITIALS</p>
<p><i>Noleen Jackson</i> JACKSON Noleen</p> <p><i>NJ</i> INITIALS</p>	<p><i>Julie McBean</i> McBEAN Julie</p> <p><i>JM</i> INITIALS</p>
<p><i>Harry XEAR</i> XEAR Harry</p> <p><i>HX</i> Initials</p>	<p><i>Martin McDonald</i> McDONALD Martin</p> <p><i>MMCD</i> INITIALS</p>
<p><i>Pauline Last</i> LAST Pauline</p> <p><i>PL</i> INITIALS</p>	<p><i>Frank Menegott</i> MENEGOTT Frank</p> <p><i>FM</i> INITIALS</p>
<p><i>David Lyall Int.</i> LYALL David Int.</p> <p><i>DL Int.</i> Int.</p>	<p><i>John Meyer</i> MEYER John</p> <p><i>JM</i> INITIALS</p>

A.C.N. 000 000 993
 Subsidiary Companies:
 Permanent Registry Limited A.C.N. 000 334 634
 Permanent Custodians Limited A.C.N. 001 426 384
 Permanent Depository Limited A.C.N. 003 278 831
 Permanent Trustee Australia Limited A.C.N. 006 412 913
 Permanent Nominee (Aust.) Limited A.C.N. 000 154 441
 Superannuation Nominee Pty. Limited A.C.N. 000 305 233
 Permanent Property Management Limited A.C.N. 002 232 573
 Permanent Trustee Company (Canberra) Limited A.C.N. 006 390 387
 Rental Housing Custodians Limited A.C.N. 003 284 437



GROUP "B" SIGNATORIES

 MORGAN Kelli	 INITIALS	 SEMMENS Ashley	 Initials
 NICHOLS Gregory	 INITIALS	 SIAMOIA Toulou	 INITIALS
 OSBORNE Robert	 INITIALS	 TCHOPOURIAN Jean-Pierre	 INITIALS
 RANIGA Pratibha	 INITIALS	 WITTON Susan	 INITIALS
 RICHARDSON Michael	 INITIALS	 WRIGHT Mark Anthony	 INITIALS
 SCHEIBMAYR Michelle	 INITIALS	 WRIGHT Michael	 INITIALS
 SCHIMPL Doris	 INITIALS		

SCHEDULE 2

**LIST OF SCHEMES SUBJECT TO THIS AGREEMENT
(Clause 1.1)**

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund

SCHEDULE 3

METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE

(Clause 2.3)

- (a) The Client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).
- (b) Any or all of the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.
- (c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a quarterly basis. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.
- (d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.
- (e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.
- (f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the Law.
- (g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

SCHEDULE 4

REPORTS AND STATEMENTS

(Clause 7(b))

- | | | |
|--------|--|------------------------------|
| 1. (a) | Bank reconciliation as at each month end | 10 days after month end |
| | (b) List of any cheques cancelled in the month | 10 days after month end |
| 2. | Listing of all assets as at each month end | 10 days after month end |
| 3. | Bank reconciliation as at each Friday | The following Monday morning |
| 4. | List of documents outstanding or intransit | 10 days after month end |
| 5. | List of insurance policies due to expire | 10 days after month end |

SCHEDULE 5

FEES
(Clause 8.1)

A Basic custody for mortgage Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

B Basic custody for property Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

Where:

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

Document includes but is not limited to a mortgage, discharge of a mortgage, variation of a mortgage, or a contract of sale;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any national, Federal, State, or Territory government agency; and

Year means twelve (12) months commencing on the Commencement Date of each Scheme.

SCHEDULE 6

**MINIMUM TERM AND NOTICE PERIOD
(Clause 11.1)**

The minimum term is the period five (5) years from the date of execution of this agreement.

After expiry of the minimum term, termination may occur on not less than three (3) months notice by either party.

SCHEDULE 7

ADDRESS AND FACSIMILE DETAILS
(Clause 14)

Permanent's Address: Level 8, 410 Queen St, BRISBANE QLD 4000

Facsimile: (07) 3842 7159

Client's Address: LM INVESTMENT MANAGEMENT LTD
Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise QLD 4217

Facsimile: (07) 55 922 505

140216/v2

16 JUN 1999

FAXED
13/09/99



Permanent Trustee
Company Limited
A.C.N. 000 000 993

8th Floor
410 Queen Street
Brisbane Qld. Australia 4000
G.P.O. Box 667
Brisbane Qld. 4001

DX 286 Brisbane

Telephone (07) 3842 7100
Fax (07) 3842 7159

14 June 1999

Our ref:tw:cor:lm

Mr P. Aubort
LM Investment Management Limited
P.O. Box 485
SURFERS PARADISE. QLD. 4217

Dear Peter,

RE: CUSTODY AGREEMENT

As you are aware, the relationship between LM Investment Management Limited (LMIM) and Permanent trustee Australia Limited (Permanent is governed by the Custody Agreement (the Agreement) dated 4 February 1999, together with subsequent amendments as agreed.

Following discussions, the parties have agreed to amend the Agreement so as to authorise:

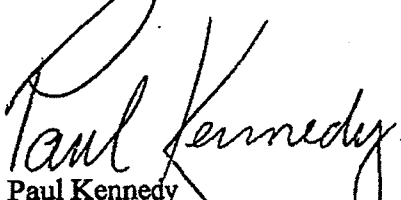
- Permanent to execute periodic debit documents and forms (as requested by LMIM); and
- LMIM to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio.

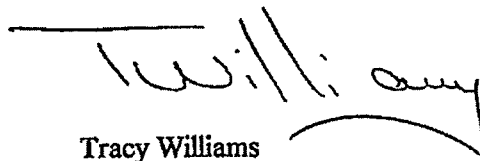
Accordingly, the Agreement requires amendments to include and reflect these changes. The proposed amendment is attached for your review (refer Clause 3.15 of the attached Agreement).


Acceptance


If all is in order, we would appreciate it if two authorised persons of LMIM would sign this letter confirming acceptance of the above. The signing of this letter by both parties will amend the Agreement under clause 23 of the Agreement. Please return the signed letter and the amended Agreement to the writers as soon as possible.

Yours sincerely,


Paul Kennedy
Business Development Manager (Qld)


Tracy Williams
Manager - Corporate Services (Qld)


Authorised person Peter Auzan
LM Investment Management Limited


Authorised person
LM Investment Management Limited

- 3.8 Permanent may appoint or engage at the Client's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons (not being persons appointed under clause 6.1) where it reasonably considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under this agreement. Permanent is not liable for any loss, damage or expense suffered or incurred as a result of any act of omission whatever (including a negligent act or omission) of a person appointed or engaged under this clause 3.8.
- 3.9 Persons appointed or engaged in accordance with clause 3.8 or 6.1 may be related to or associated with Permanent and may be paid and receive their normal fees or commissions.
- 3.10 Permanent may in the ordinary course of its business, without reference to the Client, effect transactions in which Permanent has directly or indirectly a material interest, or a relationship of any kind with another person, which may involve a potential conflict with Permanent's duty to the Client, and Permanent is not liable to account to the Client for any profit, commission or remuneration made or received in relation to those transactions or any connected transactions. A reference in this clause 3.10 to Permanent includes a Sub-custodian, and Permanent shall in any event act in a bona fide manner in relation to any such transaction.
- 3.11 Permanent and its Sub-custodians may for convenience or expedience use Austraclear, RITS, CHESS, SWIFT and/or any other electronic funds or assets transfer system whether within Australia or overseas.
- 3.12 Permanent is authorised to comply with any obligations imposed on it by law.
- 3.13 Permanent may do any other things which it considers necessary, desirable, incidental to or in furtherance of the matters referred to in this clause 3 or clause 4.
- 3.14 Subject to this agreement, Permanent has absolute discretion as to the exercise of all powers, authorities and discretion vested in it under this agreement.
- 3.15 Permanent is authorised to execute periodic debit documents and third party bank account access forms, principal and third party on-line operation forms and similar forms or agreements (the "Forms"), as requested by the Client from time to time, which authorise and or allow the Client to automatically deduct or pay amounts from accounts held by Permanent containing assets of the portfolio. Notwithstanding Clause 3.3, Permanent may allow amounts to be deducted from accounts containing assets of the Portfolio pursuant to the Forms without obtaining Instructions from the client. Other than where Permanent is fraudulent the Client indemnifies Permanent for any indemnity, warranty or obligation given by or imposed on Permanent in or pursuant to any such Form or arrangement.

4. DUTIES OF PERMANENT

- 4.1 The Client is responsible for taking all decisions in relation to the Portfolio and properly communicating to Permanent Instructions in relation to the assets of the Portfolio. Subject to this agreement, Permanent must act on the Client's Instructions in relation to any assets of the Portfolio. If Permanent does not have Instructions, Permanent is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.

Amending Deed

Date: 1st day of September 2004.

Parties: **PERMANENT TRUSTEE AUSTRALIA LIMITED** (ACN 008 412 913) of Level 4, 35 Clarence Street, Sydney NSW ("**Permanent**") and,

LM INVESTMENT MANAGEMENT LTD (ACN 004 027 749) of Level 4, RSL Centre, 44A Cavill Avenue, Surfers Paradise, Queensland ("**Client**").

Recitals:

- A. The Client and Permanent entered into a Custody Agreement dated 4 February 1999 (the "Custody Agreement").
- B. The Custody Agreement appointed Permanent as custodian of the Assets of those Schemes specified in the Custody Agreement.
- C. The Custody Agreement was amended by including additional Schemes on 20 May 1999, 24 May 2000, 18 March 2002 and 19 November 2002.
- D. The Client wishes to appoint Permanent as custodian of an additional scheme not included in the Custody Agreement or subsequent amendments and the Custodian has agreed to accept the appointment in relation to the additional scheme on the terms and conditions of the Custody Agreement
- E. Under clause 23 of the Custody Agreement, the Client and Permanent may amend the Custody Agreement by deed. The parties have agreed to amend the Custody Agreement to include the additional appointment as set out herein.

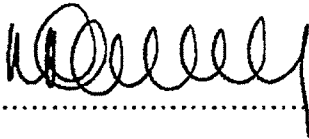
Terms:

- 1. In this Deed, the words and phrases shall have the same meaning as in the Custody Agreement.
- 2. The Custody Agreement is amended by deletion of Schedule 2 and its replacement with the Schedule 2 set out as Annexure "A".

3. The Custody Agreement is amended by deletion of Schedule 3 and its replacement with the Schedule 3 set out as Annexure "B".
4. The Custody Agreement is amended by deletion of Schedule 5 and its replacement with the Schedule 5 set out as Annexure "C".
5. The amendments set out in this Deed shall take effect on and from the date of this Amending Deed.
6. Except as expressly stated in Clauses 2 , 3 and 4 of this Amending Deed, the terms of the Custody Agreement are not amended by this Amending Deed.

Executed as a Deed on the date first stated:

EXECUTED BY LM INVESTMENT)
 MANAGEMENT LTD ACN 077 208 461)
 in accordance with section 127 (i) of the)
 Corporation Act by the authority of its)
 directors:)
)
)
)



.....
 Signature of Secretary/Director



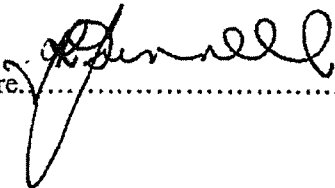
.....
 Signature of Director

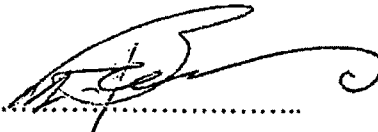
PERMANENT TRUSTEE AUSTRALIA LIMITED A.C.N. 008 412 913
 by its Attorneys who state that they have no notice of revocation of the
 Power of Attorney dated 2nd June 1993, whereby they execute this deed
 document or instrument.

Power of Attorney No.....

Group A Attorney

Group A Attorney

Signature. 



Annexure A

Schedule 2

LIST OF SCHEMES SUBJECT TO THIS AGREEMENT

1. LM Select Mortgage Income Fund
2. LM Mortgage Income Fund
3. LM Cash Performance Fund
4. LM Special Performance Fund
5. LM Wholesale Mortgage Income Fund
6. LM Property Performance Fund
7. LM Currency Protected Australian Income Fund

ANNEXURE B

SCHEDULE 3

METHODS AND STANDARDS FOR ASSESSING PERMANENT'S PERFORMANCE

- (a) The client will monitor the performance of Permanent and will ensure that Permanent continues to meet its commitments for holding the Portfolio of each Scheme the subject of this agreement. The Client will ensure that the contractual arrangements with Permanent remain current and reflect the requirements of each Scheme and the law and that Permanent maintains appropriate arrangements with respect to information providers, registries, Sub Custodians and clearing systems (if relevant).
- (b) Any or all the policies and procedures developed by the Client in the monitoring of external service providers may be applied to the monitoring of Permanent.
- (c) While Permanent is the custodian of a Scheme, to satisfy these requirements the SCO will meet with an Authorised Person of Permanent on a yearly basis or more frequent as required. In addition to the above matters, in that meeting the SCO will review any other matters with Permanent relating to a Scheme that has arisen in the course of the delivery of services by Permanent.
- (d) The SCO will report any matters of concern that arise during the course of discussion with Permanent to the Client's compliance committee.
- (e) The Client's compliance auditor will also have regard to the performance of Permanent in its assessment of the performance of the Client in meeting the requirements of its compliance plan. In particular the Client's compliance auditor will assess whether Permanent has appropriate compliance and control systems in place. To do so the Client's compliance auditor will liaise with Permanent's auditors to determine the status and appropriateness of Permanent's compliance and control systems on an ongoing basis.
- (f) The Client's compliance auditor will assess whether Permanent has complied with its obligations under this agreement and include the assessment in its annual report to the Client as required by Section 601HG(3)(c) of the law.
- (g) A copy of any report by the SOC or the Client's compliance auditor prepared in accordance with this schedule, will be provided to Permanent.

Annexure "C"

Schedule 5

FEES: **(Clause 8.1)**

A Basic Custody for mortgage Schemes;

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$20,000 per Year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

B Basic custody for property Schemes:

The greater of either:

- (a) \$400.00 per \$1 million of the gross value of the assets of each Scheme (plus GST) per Year; or
- (b) \$15,000 per Year (plus GST) for each Scheme.

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the relevant Scheme.

PLUS

An execution fee of \$20 per Document (excluding this agreement) where Permanent is requested by the Client to execute a Document.

C Basic Custody for the LM Cash Performance Fund (LMCPF Scheme):

The greater of either:

- (a) \$300.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per year up to and including \$500 million; plus \$200.00 per \$1 million of the gross value of the assets of the LMCPF Scheme (plus GST) per Year for the amounts over \$500 million; or

(b) \$15,000 per Year (plus GST),

payable quarterly in arrears (and pro rated for the first quarter) from the Commencement Date of the LMCPF Scheme.

D Basic Custody for the LM Special Participation Fund

(a) \$10,000.00 per Year (plus GST),

payable quarterly in arrears (and pro-rated for the first quarter) from the Commencement Date of the Scheme.

E Basic Custody for the LM Wholesale Mortgage Income Fund:

The greater of either:

(a) \$400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

(b) \$10,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

F Basic Custody for the LM Currency Protected Australian Income Fund:

The greater of either:

(a) \$400.00 per one million gross value of the assets of each Scheme (plus GST) per Year; or

(b) \$20,000 per year (plus GST) for each Scheme,

payable quarterly in arrears (and pro-rated to the first quarter) from the Commencement Date of the Relevant Scheme.

In making the calculation of 4 bps, the Total Assets of the Fund is to exclude funds invested in the LM Mortgage Income Fund, so as to avoid "double-counting" (as the Fund will only invest in the LM Mortgage Income Fund and cash). As such, the minimal annual fee of \$20,000 is likely to always apply.

Where:

Commencement Date means the date that Permanent and the Client agree to include a Scheme in Schedule 2 of this agreement;

Document includes but is not limited to a mortgage, variation of a mortgage or a contract of sale;

GST means any goods and services tax or tax on the provision of goods and services assessed or charged or assessable or chargeable by, or payable to, any National, Federal, State, or Territory government agency; and

Year means twelve (12) months commencing on the Commencement date of each Scheme.

Duplicate

SUPREME COURT OF QUEENSLAND

**REGISTRY: Brisbane
NUMBER: 3383/13**

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

AND

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

AND

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

AND

Third Respondent: ROGER SHOTTON

AND

**Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

ORDER

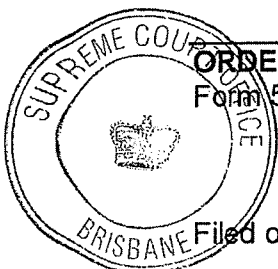
Before: Justice Dalton

Date: 21 August, 2013

**Initiating document: Application filed 29 April, 2013 by Roger Shotton and
Application filed 3 May 2013 by Australian Securities
and Investments Commission ("Applications").**

THE ORDER OF THE COURT IS THAT:

- 1. Pursuant to section 601ND(1)(a) of the Corporations Act 2001 (Cth)
("the Act") LM Investment Management Limited (Administrators**



**ORDER
Form 59 R.661**

Filed on behalf of the Third Respondent

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

Appointed) ACN 077 208 461 ("LMIM") in its capacity as Responsible Entity of the LM First Mortgage Income Fund is directed to wind up the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") subject to the orders below.

2. Pursuant to section 601NF(1) of the Act, David Whyte ("Mr Whyte"), Partner of BDO Australia Limited ("BDO"), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution ("the Appointment").
3. Pursuant to section 601NF(2), that Mr Whyte:-
 - (a) have access to the books and records of LMIM which concern the FMIF;
 - (b) be indemnified out of the assets of the FMIF in respect of any proper expenses incurred in carrying out the Appointment;
 - (c) be entitled to claim remuneration in respect of the time spent by him and by employees of BDO who perform work in carrying out the Appointment at rates and in the sums from time to time approved by the Court and indemnified out of the assets of the FMIF in respect of such remuneration.
4. Nothing in this Order prejudices the rights of:
 - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
 - (b) the receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
5. Pursuant to sections 601NF (2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.
6. Pursuant to sections 601NF (2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.
7. Without derogating in any way from in any way from the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to:
 - (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:

- (i) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate and/or finalise the sale of the property;
 - (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
 - (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;
 - (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and
- (b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions.
8. The First Respondent must, within 2 business days of the date of this Order:
- (a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and
 - (b) make a copy of this order available, in PDF form, on:
 - (i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;
 - (ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.
9. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.
10. All other questions of costs of or incidental to the Applications and the Application filed 15 April 2013 by Raymond and Vicki Bruce are adjourned to a date to be fixed by the Court.

IT IS DIRECTED THAT:

11. Any party wishing to contend that the First Respondent is not entitled to indemnity from the ~~FMI~~^{FUNA} in relation to the Applications shall file an application to be heard and determined at the same time as the other issues as to costs.
12. Any application for the costs of complying with subpoenas issued in the proceedings are adjourned to a date to be fixed, and any time limitation imposed by rule 418 (5) of the UCPR is extended pursuant to rule 7 of the UCPR, to allow for the hearing of any such application at the date to be fixed.

Signed: *nee*

SUPREME COURT OF QUEENSLAND

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

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

AND

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

v

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

FILE NO/S: BS3508/15
DIVISION: Trial Division
PROCEEDING: Application
DELIVERED ON: 15 October 2015
DELIVERED AT: Brisbane
HEARING DATE: 20 July 2015
JUDGE: Jackson J
ORDER: **The order of the court is that:**

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

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

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

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

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

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

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

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

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

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

Introduction

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

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

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

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

Some historical aspects

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

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

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

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

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

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

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

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

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

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

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

Winding up a trust

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

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

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

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

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

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

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

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

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

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

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

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

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

Provisions to wind up a registered scheme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The effect of s 601NF(1)

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

²⁹ [1984] 1 Qd R 371.

³⁰ [1984] 1 Qd R 371, 376.

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

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

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

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

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

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

2. Pursuant to section 601NF(1) of the Act, David Whyte (“Mr Whyte”), Partner of BDO Australia Limited (“BDO”), is appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (“the appointment”).
- ...
5. Pursuant to sections 601NF(2) of the Act, Mr Whyte is appointed as the receiver of the property of the FMIF.
6. Pursuant to sections 601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to paragraph 5 above, the powers set out in section 420 of the Act.
- ...
7. Without derogating in any way from in any way from (sic) the Appointment or the Receiver’s powers pursuant to these Orders, Mr Whyte is authorised to:
- (a) take all steps necessary to ensure the realisation of property of FMIF held by LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as Responsible Entity of the FMIF in relation to the property, including but not limited to:
- ...
- (ii) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
- (iii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property...”

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

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

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

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

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

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

Conflict of powers and responsibilities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Voidable transactions and insolvent trading

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

⁴¹ (1987) 12 ACLR 54.

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

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

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

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

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

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

Members units and capital

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

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

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

⁴⁸ (1996) 19 ACSR 569, 570.

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

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

⁵¹ [1969] VR 315.

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

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

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

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

Managing scheme property

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

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

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

...

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

...

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

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

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

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

...

18.2 Payment of Debts

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

...

21.1 Custodian to hold as agent of RE

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

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

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

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

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

Register of members and membership

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

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

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

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

Financial and directors' reports and audit obligations under the CA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷³ (2010) 81 ACSR 145, 155 [42].

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

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

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

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

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

Reports on the financial status of the FMIF

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

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

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

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

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

Parts 11, 12 and 14 of the constitution

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

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

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

[166] Other orders sought and disposition

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

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

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

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3508 of 2015

IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS APPOINTED) ACN 077 208 461

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

AND

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

AND

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

ORDER

Before: Jackson J
Date: 17 December 2015
Initiating document: Originating Application filed 8 April 2015; Amended Originating Application filed 20 July, 2015; Further Amended Originating Application filed 16 December, 2015

THE ORDER OF THE COURT IS THAT:-

1. In respect of the 60 members of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") to whom reference is made in paragraph 26 of the Affidavit of Murray Daniel sworn on 17 July 2015 and filed on 20 July 2015, the notice sent to those members in the manner described in paragraphs 27 to 30 of the Affidavit of Mr Daniel is taken to be sufficient notice for the purposes of Order 4(ii) of the Order of this Court made on 7 May 2015.

ORDER

Form 59 R.661

Filed on behalf of the Respondent

Tucker + Cowen Solicitors
15 Adelaide Street
259
BRISBANE, QLD 4001

2. Subject to the matters expressly set out in this Order, nothing in this Order derogates from the powers and rights conferred upon David Whyte (“**Mr Whyte**”) by Order of this Court dated 21 August 2013 in proceeding BS3383 of 2013 (the “**existing Order**”) as the person appointed:
 - (a) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (“the **Appointment**”); and
 - (b) as the receiver of the property of the FMIF.
3. Pursuant to section 601NF(2) of the *Corporations Act 2001* (“the **Act**”) Mr Whyte is empowered to determine, in accordance with paragraphs 4 to 10 herein, whether, and if so to what extent, the Second Applicant (“**LMIM**”) is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against, LMIM in acting as Responsible Entity of the FMIF.
4. The First Applicants (“the **Liquidators**”) are directed to:-
 - (a) ascertain the debts payable by, and the claims against, LMIM in accordance with the Act;
 - (b) adjudicate upon those debts and claims in accordance with the provisions of the Act;
 - (c) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, debt payable by or claim against LMIM which is admitted by the Liquidators in the winding up of LMIM (each such claim for indemnity referred to below as a “**Creditor Indemnity Claim**”);
 - (d) identify whether LMIM has (at the date of this Order and from time to time) a claim for indemnity from the property of the FMIF in respect of any, or any part of any, expense or liability incurred by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (each such claim for indemnity referred to below as an “**Administration Indemnity Claim**”); and
 - (e) identify whether LMIM has a claim for indemnity from the property of the FMIF in respect of any, or any part of any, other expense or liability incurred and paid by LMIM in its capacity as Responsible Entity for the FMIF or by John Richard Park and Ginette Dawn Muller in acting as administrators or liquidators of LMIM (whether incurred in their own name or in the name of LMIM) insofar as the expense or liability was or is incurred in connection with LMIM acting as Responsible Entity for the FMIF (being an expense or liability to which paragraphs 4(c) and 4(d) above do not apply) (each such claim for indemnity referred to below as a “**Recoupment Indemnity Claim**”).

5. Within sixty days of the date of this Order the Liquidators must notify Mr Whyte in writing of any Administration Indemnity Claim and any Recoupment Indemnity Claim identified by the Liquidators as at the date of this Order.
6. Within 14 days after:-
 - (a) any debt or claim is admitted by the Liquidators in the winding up of LMIM and, in respect of such debt or claim, a Creditor Indemnity Claim is identified by the Liquidators;
 - (b) any Administration Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators; or
 - (c) any Recoupment Indemnity Claim (being one to which paragraph 5 of this Order does not apply) is identified by the Liquidators,the Liquidators must notify Mr Whyte in writing of such claim.
7. When notifying Mr Whyte of a claim in accordance with paragraphs 5 or 6 of this Order (each such claim for indemnity referred to below as an “Eligible Claim”), the Liquidators must:-
 - (a) Provide Mr Whyte with:-
 - (i) (if the Eligible Claim is a Creditor Indemnity Claim) a copy of the relevant proof of debt and supporting documentation relating to the Eligible Claim; and
 - (ii) Such other information the Liquidators consider relevant to LMIM’s claim for indemnity from the property of the FMIF;
 - (b) Within 14 days of receipt of a request from Mr Whyte pursuant to paragraph 8(a) below for further information in respect of an Eligible Claim, provide such reasonably requested further information to Mr Whyte.
8. Mr Whyte is directed to:-
 - (a) Within 14 days of receipt of an Eligible Claim, request any further material or information he reasonably considers necessary to assess the Eligible Claim;
 - (b) Within 30 days of receipt of an Eligible Claim or of the information requested in accordance with paragraph 8(a) above (whichever is the later):-
 - (i) accept the Eligible Claim as one for which LMIM has a right to be indemnified from the property of the FMIF; or
 - (ii) reject the Eligible Claim; or
 - (iii) accept part of it and reject part of it;

and give to the Liquidators written notice of his determination; and

- (c) If Mr Whyte rejects an Eligible Claim, whether in whole or in part, provide the Liquidators with written reasons for his decision when, or within 7 days after, giving notice of his determination.
9. Within 28 days of receiving notification from Mr Whyte of the reasons for rejecting, in whole or in part, any Eligible Claim ("**Rejected Claim**"), the Liquidators:-
- (a) may make an application to this Honourable Court for directions as to whether or not the Eligible Claim is or is not one for which LMIM has a right of indemnity out of the scheme property of the FMIF; or
 - (b) must notify the relevant creditor for any Rejected Claim of:-
 - (i) Mr Whyte's decision;
 - (ii) any reasons provided by Mr Whyte for that decision;
 - (iii) any material provided pursuant to paragraphs 6, 7 or 8 hereof; and
 - (iv) whether they intend to make an application for directions in respect of the Rejected Claim pursuant to paragraph 9(a) hereof.
10. Mr Whyte has liberty to apply to the Court for direction in respect of any question arising in connection with his consideration or payment of an Eligible Claim.
11. Pursuant to section 601NF(2) of the Act, the parties are directed that for so long as the Appointment and the appointment of Mr Whyte as receiver of the property of the FMIF continue, LMIM shall not be responsible for, and is not required to discharge, the functions, duties and responsibilities set out in clauses 16.7(c), 16.7(f), 16.7(g) and 18.2 of the constitution of the FMIF.
12. Pursuant to section 601NF(2) of the Act, Mr Whyte is directed not to make any distribution to the members of the FMIF, without the authority of a further Order of the Court.
13. Pursuant to section 601NF(2) of the Act:-
- (a) the Liquidators are directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the constitution of the FMIF;
 - (b) LMIM is relieved of the obligations imposed by clauses 9, 10 and 22 of the constitution of the FMIF; and
 - (c) Mr Whyte is authorised and empowered to exercise the powers of, and is responsible for the functions of, the Responsible Entity as set out in Clauses 9, 10 and 22 of the constitution of the FMIF.

14. Pursuant to section 601NF(2) of the Act:
 - (a) Mr Whyte is directed to apply to ASIC to obtain relief from the financial reporting and audit obligations imposed by Part 2M.3 of the Act and section 601HG of the Act; and
 - (b) in the event that the parties are unable to obtain relief from those financial reporting and audit obligations, then Mr Whyte is directed to provide to LMIM all reasonably requested information as is necessary to enable LMIM to comply with the financial reporting obligations imposed on LMIM as responsible entity of the FMIF under Part 2M.3 of the Act and the constitution of the FMIF.
15. Pursuant to section 1322(4)(c) of the Act, Mr Park and Ms Muller are relieved in whole from any civil liability in respect of a contravention or failure to discharge LMIM's financial reporting obligations under Part 2M.3 of the Act for the period from 19 March 2013 to 31 December 2015.
16. Nothing in this Order prejudices the rights of:
 - (a) Deutsche Bank AG pursuant to any securities it holds over LMIM or the FMIF; or
 - (b) The receivers and managers appointed by Deutsche Bank AG, Joseph David Hayes and Anthony Norman Connelly.
17. The Liquidators are directed to notify any claim for the reasonable costs and expenses of LMIM of carrying out the work it is required to do by and under this order as an Administration Indemnity Claim under paragraph 4 and may make such a claim from time to time.
18. The Liquidators are entitled to claim reasonable remuneration in respect of the time spent by them and employees of FTI Consulting who perform work in carrying out the work they are required to do by and under this order in connection with the FMIF at rates and in the sums from time to time approved by the Court and to be indemnified out of the assets of the FMIF in respect of such remuneration.
19. Service of the Further Amended Originating Application dated 16 December, 2015 ("**the Further Application**") under s.96 of the Trusts Act be effected on the members of the LM Cash Performance Fund ARSN 087 304 032, the LM Currency Protected Australian Income Fund ARSN 110 247 875, the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868, the LM Australian Income Fund ARSN 133 497 917 and the LM Australian Structured Products Fund ARSN 149 875 669 ("**Other Funds**") and on the members of the FMIF as follows:-
 - (a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Members in the form of Schedule 7 to the Further Application ("**the Notice**"), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;

- (b) by the Respondent sending by email to those members of the FMIF for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;
 - (c) by the First Applicants sending by email to those members of the Other Funds for whom an email address is recorded, the Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely on the website www.lminvestmentadministration.com;
 - (d) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any member, and the First Applicants have a postal address for those members, the First Applicants are to post the Notice to the postal address of those members; and
 - (e) where the Respondent receives a response to an email that indicates the email was not received, or if the Respondent does not hold an email address for any member, and the Respondent has a postal address for those members, the Respondent is to post the Notice to the postal address of those members.
20. That service of the Further Amended Originating Application under s.511 of the Act be effected on the creditors of the Second Applicant as follows:-
- (a) by the First Applicants uploading to the website www.lminvestmentadministration.com copies of this application, the statement of facts to be filed, the Notice to Creditors in the form of Schedule 8 to the Further Application (“**the Creditors’ Notice**”), any order made as to service and the substantive affidavits (including all the exhibits) that the First Applicants intend to rely upon in support of the Further Application;
 - (b) by sending by email to those creditors of the Second Applicant, for whom an email address is recorded, the Creditors’ Notice and stating that they may view all substantive Court documents upon which the First Applicants intend to rely in support of the Further Application on the website www.lminvestmentadministration.com; and
 - (c) where the First Applicants receive a response to an email that indicates the email was not received, or if the First Applicants do not hold an email address for any creditor, and the First Applicants have a postal address for those creditors, the First Applicants are to post the Creditors’ Notice to the postal address of those creditors.
21. That service of the Further Application in accordance with any orders made be deemed to be effective on each of the members of the FMIF and Other Funds and the creditors of the Second Applicant.
22. That, where the First Applicants propose to rely on further material in support of the Further Application, they may serve that material by uploading the material to the website and sending notice by email or, where the First Applicants do not hold a

valid email address, by post to those members or creditors, with such notice to direct the members or creditors to the further material which has been uploaded at the website www.lminvestmentadministration.com.

23. That the First Applicants and Respondent not be required to take further steps to serve the members of the FMIF, the Other Funds or creditors of the Second Applicant whose email addresses return permanent undeliverable receipts and for whom the First Applicants or the Respondent (as the case requires) do not have a postal address.
24. That the Respondent be at liberty to upload any material served by the Applicants on the website lmfmif.com.
25. Directions for the hearing of the relief sought by the Further Application as follows:-
 - (a) by no later than 27 January, 2016, the Applicants are to file any affidavit material in support of the Further Application;
 - (b) by no later than 27 January, 2016, the Applicants are to serve, pursuant to Part 4 of Chapter 4 of the Uniform Civil Procedure Rules 1999 (Qld), this Further Amended Originating Application and any supporting affidavit material on which the Applicants intend to rely, on the Respondent;
 - (c) by no later than 4 February, 2016, any party other than the Respondent who wishes to appear at the hearing of the Further Application shall file and serve, at the Applicants' address for service, a Notice of Appearance in Form 4;
 - (d) by no later than 18 February, 2016, the Respondent is to file and serve any affidavit upon which he intends to rely at the hearing of the Further Application;
 - (e) by no later than 18 February, 2016, any party other than the Respondent who has filed a Notice of Appearance in accordance with sub-paragraph (c) herein is to file any affidavit upon which it intends to rely at the hearing of the Further Application.
26. The parties' costs of and incidental to this application, including the costs reserved by Orders of this Court on 7 May 2015, be paid out of the assets of the FMIF on the indemnity basis.
27. Any person affected by these Orders has liberty to apply.
28. The Further Amended Originating Application filed 15 December, 2015 is otherwise adjourned to 10am on 22 February, 2016.

Signed:



Deputy Registrar

- 1 AUG 2018

SUPREME COURT OF QUEENSLAND

FILED
BRISBANE

REGISTRY: BRISBANE
NUMBER: BSBS3508/2015

Applicant: JOHN RICHARD PARK AND GINETTE DAWN MULLER
AS LIQUIDATOR OF LM INVESTMENT MANAGEMENT
LIMITED (IN LIQUIDATION) (RECEIVERS AND
MANAGERS APPOINTED) ACN 007 208 461 THE
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288

AND

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

AND

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

ORDER

Before: Jackson J
Date: 18 July 2018
Initiating document: Application filed on 13 July 2018.

THE ORDER OF THE COURT IS THAT:

1. The Second Applicant be included as an applicant in respect of this application.
2. Pursuant to section 601NF(2) of the *Corporations Act* 2001 (Cth) ("the Act"), it is directed that:
 - (a) any further claim by the Liquidators for an indemnity and/or payment from the FMIF for their reasonable costs or expenses of carrying out the work they or

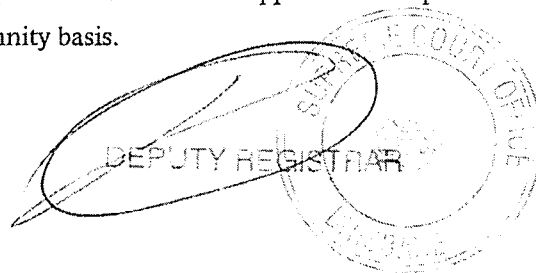
ORDER
Filed on behalf of the Applicants
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

Russells
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: JTW:20131259

LMIM are required to do by and under the Order of Justice Jackson dated 17 December 2015 (“the December Orders”) in connection with the FMIF (not being the subject of a claim already made under the December Orders) be submitted to the Court for approval under paragraph 3 of this order, and not to Mr Whyte under paragraph 6 of the December Orders; and

- (b) paragraph 17 of the December Orders ceases to have effect on and from the date of this Order, except as to any claims already notified thereunder.
- 3. The Liquidators are entitled to claim their further reasonable costs and expenses of carrying out the work they or LMIM are required to do by and under the December Orders in connection with the FMIF, not being the subject of a claim already made under the December 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.
- 4. The Liquidators notify Mr Whyte of any application to the Court for approval of:
 - (a) reasonable remuneration under paragraph 18 of the December Orders; or
 - (b) costs or expenses under paragraph 2 of this order.at least 14 days in advance of the hearing of that application.
- 5. Pursuant to rule 69(1) of the *Uniform Civil Procedure Rules 1999* (Qld), Ginette Dawn Muller be removed as a party to the proceeding, with effect from 18 July 2018.
- 6. The parties’ costs of the application be paid out of the assets of the FMIF on the indemnity basis.

Signed:



DEPUTY REGISTRAR

QUEENSLAND COURT OF JUSTICE
Brisbane

SUPREME COURT OF QUEENSLAND

CITATION: *LM Investment Management Limited & Anor v Whyte* [2019]
QSC 233

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

AND

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

v

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

AND

**SAID JAHANI IN HIS CAPACITY AS RECEIVER AND
MANAGER OF THE ASSETS, UNDERTAKINGS,
RIGHTS AND INTERESTS OF LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION)
(RECEIVERS AND MANAGERS APPOINTED) ACN
077 208 461 AS THE RESPONSIBLE ENTITY OF THE
LM CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 110 247 875 AND THE LM
INSTITUTIONAL CURRENCY PROTECTED
AUSTRALIAN INCOME FUND ARSN 122 052 868
(Second Respondent)**

FILE NO/S: BS No 3508 of 2015

DIVISION: Trial Division

PROCEEDING: Application filed 10 October 2018 and an application filed 1 February 2019

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 October 2019

DELIVERED AT: Brisbane

HEARING DATE: For the application filed 10 October 2018 – 10 December 2018
For the application filed 1 February 2019 – 13 March 2019

JUDGE: Jackson J

ORDER: **On the application filed 10 October 2018 the order of the court is that:**

- 1. The application is dismissed.**
- 2. The parties exchange and file written submissions as to costs by 8 October 2019.**

On the application filed 1 February 2019 the order of the court is that:

- 1. The first respondent is authorised and empowered to make an interim distribution from the property of the LM First Mortgage Investment Income Fund (“FMIF”) among the members of the FMIF of up to \$40 million.**
- 2. It is declared that each member holding “Class C” Units in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member’s units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.**
- 3. The first respondent’s costs of the application be costs in the winding up of the FMIF to be assessed on the indemnity basis and paid to the first respondent from the property of the FMIF.**
- 4. Trilogy exchange and file with any opposite party submissions as to costs by 8 October 2019.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the second applicant is the responsible entity of a registered managed investment scheme – Where the first applicant is the liquidator of the second applicant – Where the first respondent was appointed to take responsibility for ensuring the scheme is wound up in accordance with its

constitution – where the first applicant applied to the court for directions that the first applicant take responsibility for ensuring the scheme was wound up in accordance with its constitution – Where the court held that the winding up of the scheme should not be transferred from the first respondent to the first applicant

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent applied for orders that he be authorised to make an interim distribution to the members of the scheme in a sum of up to \$40 million

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – Where the first respondent was appointed to ensure a registered managed investment scheme is wound up in accordance with its constitution – Where the first respondent sought a declaration that Class C unit holders were entitled to be paid amounts in the winding up of the scheme – Where the court held that Class C members could receive distributions on the footing their entitlements were ascertained by reference to the appropriate calculation of units in AUD as at the dates of the winding up

ASIC v Atlantic 3-Financial (Aust) Pty Ltd [2004] 1 Qd R 591, cited

ASIC v Letten (No. 7) (2010) 190 FCR 59, cited

ASIC v Letten [2010] FCA 140, cited

Bruce v LM Investment Management Limited (in liquidation) & Ors [2019] QSC 126, cited

Carl Zeiss Stiftung v Herbert Smith & Co (No 2) [1969] 2 Ch 276, cited

Frost v Bovaird (2012) 203 FCR 95, cited

Hung v Warner; re Bellpac Pty Ltd (receivers and managers appointed) (in liquidation) [2013] FCAFC 48, cited

Ide v Ide (2004) 184 FLR 44, cited

LM Investment Management Ltd (in liq) v Bruce and others (2014) 102 ACSR 481, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66, cited

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

Park v Whyte (No. 2) [2018] 2 Qd R 413, cited

Park v Whyte (No. 3) [2018] 2 Qd R 475, cited

Re Bruce & Anor v LM Investment Management Limited & Ors [2013] QSC 192, cited
Re Stacks Managed Investments Ltd (2005) 54 ACSR 466, cited

Corporations Act 2001 (Cth), ss 420, 473, 563B, 601NF, 1581,
Insolvency Law Reform Act 2016 (Cth)
Trusts Act 1973 (Qld), s 59

COUNSEL: For the application filed on 10 October 2018 (“first application”):
 J Peden QC and S Russell for the applicant liquidator
 J McKenna QC and D Ananian-Cooper for the respondent
 David Whyte
 D Turner for Said Jahani

For the application on 1 February 2019 (“second application”):

J McKenna QC and D Ananian-Cooper for the applicant
 David Whyte

SOLICITORS: For the application on 10 December 2018:
 Russells for the applicant liquidator
 Tucker & Cowen for the respondent David Whyte
 HWL Ebsworth for Said Jahani

For the application on 13 March 2019:
 Tucker & Cowen for the respondent David Whyte
 HWL Ebsworth for Said Jahani

JACKSON J:

- [1] These two applications are related and, accordingly, may be dealt with together in these reasons. They are also related to a separate set of applications that proceeded after these applications were heard.¹
- [2] The first application was heard on 10 December 2018. By it, the liquidator of LM Investment Management Limited (in liquidation) (receivers appointed) (“LMIM”) applied for directions as to how the registered managed investment scheme named the LM First Mortgage Investment Fund (“FMIF”) is to be wound up consequent upon earlier orders resolving an earlier directions application court made on 8 and 21 August 2013,²

¹ *Bruce v LM Investment Management Limited (in liquidation) & Ors* [2019] QSC 126.

² *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

and 17 December 2015 as varied,³ that I will term the “First Directions Application”,⁴ and other relevant decisions as to the liquidator’s remuneration and expenses.⁵ Although mostly directed to the winding up of the FMIF, the first application sought some orders in relation to two other registered managed investment schemes, the LM Australian Income Fund (“AIF”) and the LM Australian Structured Products Fund (“ASPF”). LMIM is the responsible entity of all three schemes. The first respondent, David Whyte is a person appointed⁶ to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders made under s 601NF(2) of the *Corporations Act 2001 (Cth)* (“CA”).⁷ He was also appointed as the receiver of the scheme property of the FMIF, with powers to start and defend proceedings on behalf of LMIM as responsible entity of the FMIF.⁸

- [3] The orders applied for in the first application, in substance, would see the management of how the FMIF is to be wound up transferred to the liquidator, subject to the continuation of existing legal proceedings by Mr Whyte as receiver of LMIM as responsible entity of the FMIF. It is necessary to deal with the facts and grounds of the application in some detail. Nevertheless, it is relevant to observe that as long ago as July 2013 the liquidator opposed any order that Mr Whyte be appointed as a person to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution⁹ and, since that order was made, the liquidator has sought to overturn or reduce Mr Whyte’s role on two previous occasions, by an appeal from the orders made on 8 and 21 August 2013,¹⁰ and by the First Application for Directions.¹¹ Accordingly, this is not the first occasion on which the liquidator has sought to resist or reduce Mr Whyte’s appointed role.
- [4] The second application was heard on 13 March 2019, and then adjourned for consideration until after the third related but separate set of applications were heard and decided. The order applied for in the second application would see Mr Whyte authorised to make an interim distribution to the members of the FMIF in a sum of up to \$40 million. It is necessary for him to seek such an order because an existing direction as to how the FMIF is to be wound up is that he not make a distribution without an order of the court.¹² Again, it will be necessary to consider the facts and grounds advanced on the second application in some detail, but an appropriate initial observation is that Mr Whyte’s application is founded on the winding up of the FMIF coming to an end, subject to two

³ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283. See also the order made 17 December 2015 and the order made on 18 July 2018 (CFI 138).

⁴ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

⁵ *Park v Whyte (No. 2)* [2018] 2 Qd R 413; *Park v Whyte (No. 3)* [2018] 2 Qd R 475. As well, there have been a number of decisions relevant to David Whyte’s remuneration as receiver and person appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the court’s orders.

⁶ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

⁷ *Corporations Act 2001 (Cth)*, s 601NF(1).

⁸ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

⁹ *Re Bruce & Anor v LM Investment Management Limited & Ors* [2013] QSC 192.

¹⁰ *LM Investment Management Ltd (in liq) v Bruce and others* (2014) 102 ACSR 481.

¹¹ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

¹² *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283, [106].

or three important pieces of litigation and other lesser matters, so that it is clear that the proposed interim distribution to members is possible and, accordingly, should be made.

- [5] The third related but separate set of applications (“Feeder Funds Proceeding judicial advice applications”) were for orders that the trustees and responsible entities that are parties to proceeding BS 13534 of 2016, known colloquially among the parties as the “Feeder Funds Proceeding” were justified in entering into a deed of settlement and release compromising the proceeding. LMIM as responsible entity of the FMIF, by Mr Whyte, is the plaintiff in the Feeder Funds Proceeding. The Feeder Funds are registered managed investment schemes, namely the LM Currency Protected Australian Income Fund (“CPAIF”), the LM Institutional Currency Protected Australian Income Fund (“ICPAIF”) and the LM Wholesale First Mortgage Income Fund (“WFMIF”). They are the defendants to the Feeder Funds Proceeding, together with LMIM in its own right. Each of the Feeder Funds holds units in the FMIF.
- [6] Orders that the responsible entities were justified in entering into the deed of settlement and release compromising the proceeding were conditions precedent to the performance of the deed of settlement and release, and were made on 22 May 2019.¹³ Because those conditions have now been satisfied, it is possible for the second application for interim distribution to proceed without jeopardising the compromise and settlement of the Feeder Funds Proceeding. Because the first application for directions by the liquidator included an order that he be appointed or authorised to act as a contradictor in respect of the Feeder Funds Proceeding, it was not appropriate to resolve either the first or the second applications before the result of the applications for judicial advice or directions as to whether the responsible entities were justified in entering into and implementing the deed of settlement and release was known.
- [7] For the reasons that follow, the conclusions I have reached are that the first application should be dismissed and an order should be made on the second application authorising Mr Whyte to make the proposed interim distribution.

First application – directions in the winding up of the FMIF and other schemes

- [8] By the first application, the liquidator applies for orders that may be grouped into categories. Summarising, the orders sought are that:
- (a) Mr Whyte’s appointment continue only in respect of his conduct on behalf of LMIM as responsible entity of the FMIF of proceeding BS 11560 of 2016, colloquially known among the parties as the “Clear Accounts Proceeding”, the Feeder Funds Proceeding and proceeding BS 2166 of 2015, colloquially known among the parties as the “EY Proceeding”;¹⁴
- (b) the liquidator henceforth take responsibility for ensuring that the FMIF is wound up in accordance with its constitution together with such ancillary orders as may be appropriate;

¹³ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

¹⁴ Surprisingly, the liquidator did not include proceeding BS 12317 of 2014, colloquially known among the parties as the “Bellpac Proceeding”, in those Mr Whyte would continue. I assume this to have been an oversight, as the Bellpac Proceeding was ready for trial at the time of hearing of the first application and it would have made no sense to transfer it from Mr Whyte’s control to the liquidator’s control. Kellie-Anne Trenfield said the most efficient structure moving forward was for Mr Whyte to maintain control of all litigation.

- (c) the liquidator or Mr Whyte, in the event that the last order is not made, file an affidavit describing any impediment that might exist to an interim distribution being made forthwith to members of the FMIF;
- (d) the liquidator and Mr Whyte file affidavits setting out budgets of remuneration and expenses for the period up to and including the payment of the final distribution to creditors and members of the FMIF (and in the liquidator's case, the AIF and ASPF);
- (e) the court approve the budgets for remuneration and expenses to be incurred as reasonable estimates in the winding up of LMIM, the FMIF, the AIF and the ASPF;
- (f) the remuneration of the liquidator be paid forthwith in the amount of 50 percent of the amount of the approved budget, with the liquidator to receive the other 50 percent and all other additional remuneration as might be ordered by the court at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;
- (g) the remuneration of Mr Whyte henceforth be dealt with in the same way;
- (h) 50 percent of the remuneration of the liquidator, in accordance with the approved budget, be paid within 30 days of the order for directions from the respective scheme property of the FMIF, AIF and ASPF, in such proportions as may be just;
- (i) 50 percent of the remuneration of Mr Whyte, in accordance with the approved budget, be paid within seven days after payments are made to the liquidator from the scheme property of the FMIF;
- (j) the expenses of the liquidator to the conclusion of the winding up of the FMIF, AIF and ASPF be paid from the scheme property of the FMIF, AIF and ASPF, in such proportions as may be just, by payment of 50 percent of the expenses in the approved budget within seven days after the end of each calendar month, with the other 50 percent of the approved budget and all other additional expenses as might be ordered to be paid at the final remuneration and expenses determination, or that the initial 50 percent be treated as being "on account" of the final determination;
- (k) the expenses of Mr Whyte henceforth be dealt with on the same basis.

[9] On any view, these proposed directions are unusual. They are opposed by Mr Whyte as to the FMIF. The liquidator's submissions in support of the orders are framed by reference to the grounds of Mr Whyte's opposition. However, at a high level, the liquidator's application is informed by three or four considerations. The most important of them is that the liquidator is unfunded for remuneration and expenses in respect of the FMIF, unless the liquidator is entitled to an indemnity from the scheme property of the FMIF. Second, the liquidator submits that the delay, costs and expenses of the winding up of the FMIF are excessive. Third, the liquidator submits that the proposed budgeting, approval and 50 percent pre-payment mechanism would introduce transparency in relation to remuneration and expenses being charged to the FMIF.

[10] Mr Whyte's opposition to the proposed orders is made only in relation to the FMIF; he has no concern or role in the administration of any other fund.

Progress of winding up the FMIF

- [11] At this point, Mr Whyte (and another receiver appointed by a secured creditor of the FMIF), have realised all of the real property assets of the FMIF, resulting in a substantial cash balance of over \$60 million that is available to meet further expenses in collecting any remaining assets in legal proceedings and for distribution to members. At the time of the hearing of the first application, the cash assets were held in the name of the custodian of the FMIF and were under the control of the secured creditor's receiver, but that receiver has now retired and Mr Whyte has control of the relevant accounts. Accordingly, the steps to finalising the winding up of the FMIF may be summarised as:
- (a) finalising the creditors or claimants who are entitled to indemnity from the FMIF. That is a process provided for by previous orders. That has been partly completed, but not finished, possibly because the liquidator ceased to do the necessary work because he was unfunded;
 - (b) making an interim distribution to the members of the FMIF;
 - (c) completing the remaining litigation matters brought by or against LMIM as responsible entity of the FMIF (by Mr Whyte) and any claims against it or him that need to be completed; and
 - (d) making any final distribution, a final audit and deregistration of the scheme.

Liquidator identifying claims for indemnity

- [12] The order made on 17 December 2015 upon the First Directions Application¹⁵ provided that Mr Whyte was authorised to determine whether and to what extent LMIM is entitled to be indemnified from the property of the FMIF in respect of any expense or liability of, or claim against LMIM acting as responsible entity of the FMIF. The order provided for a mechanism directing the liquidators to ascertain the debts payable by and the claims against LMIM, to adjudicate upon those debts and claims in accordance with the provisions of the *Corporations Act 2001* (Cth) ("CA"), to identify whether LMIM has a claim for indemnity from the property of the FMIF, and to make those claims to Mr Whyte for consideration in accordance with the order. If Mr Whyte rejected a claim for indemnity, provision was made for it to be resolved by the court, if necessary.
- [13] Regrettably, that process did not occur as envisaged, or in a timely way. In the event, on 18 July 2018 the court ordered that any further claim by the liquidator for an indemnity and payment from the property of the FMIF be submitted to the court for approval. The process envisaged by that order for the liquidator to make any further claims apparently has not been completed by the liquidators still, although the picture is somewhat crystallised by the evidence that was adduced in support of the second application for an interim distribution that is made by Mr Whyte.

¹⁵ *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte (receiver of the LM First Mortgage Investment Fund)* [2015] QSC 283.

Appointment of liquidator as contradictor

- [14] At the hearing, the liquidator did not make any detailed oral submissions in support of the application for orders that the liquidator be appointed as a contradictor in either the Feeder Funds Proceeding or the Clear Accounts Proceeding. Nevertheless, it is necessary to deal with those questions as the application for those orders was not withdrawn.

Feeder Funds Proceeding

- [15] LMIM as responsible entity of the FMIF claims relief as plaintiff in the Feeder Funds Proceeding as to whether the Feeder Funds were disentitled from receiving distributions in the winding up of the FMIF by reason of benefits or payments previously provided to and received by them, and allegedly made by LMIM as responsible entity of the FMIF in breach of trust, including whether a number of income distributions and deemed reinvestments by the Feeder Funds in units in the FMIF were void.
- [16] On 13 June 2018, the court made an order under s 59 of the *Trusts Act 1973 (Qld)* that the interests of LMIM as responsible entity of the CPAIF and the ICPAIF as defendants to the Feeder Funds Proceedings be represented by Said Jahani, a receiver appointed to the assets of those funds by a secured creditor. The WFMIF was represented by Trilogy Funds Management Ltd (“Trilogy”) as its responsible entity.
- [17] Before the hearing of the first application, the Feeder Funds Proceeding was settled at mediation and the deed of settlement and release was executed by the relevant parties through their representatives. There are, however, a number of conditions precedent to the performance of the deed, including that:
- (a) various parties to the deed, including Mr Whyte, obtain such judicial advice as they considered necessary to confirm that they were justified in entering into the deed; and
 - (b) Mr Whyte is authorised to make an interim distribution to the members of the FMIF of at least \$30 million.
- [18] Mr Whyte submitted that any order for the liquidator to be a “contradictor” in the Feeder Funds Proceeding to represent the interests of LMIM in its personal capacity was unnecessary. I agree. Alternatively, Mr Whyte and Mr Jahani submitted that if the liquidator sought to be appointed as a contradictor to represent the interests of the members of the CPAIF and ICPAIF that too was unnecessary. Mr Jahani, as receiver of the property of the CPAIF and ICPAIF has the power to conduct the defences of LMIM as responsible entity of those schemes in the Feeder Funds Proceeding, in the interests of the secured creditor and, in effect, on behalf of the members of those schemes.¹⁶ Further, on 13 June 2018, the court ordered that he represent LMIM as responsible entity for the CPAIF and ICPAIF in the Feeder Funds Proceeding. There was no evidence that any member of the CPAIF or the ICPAIF had any concern about Mr Jahani representing LMIM as responsible entity of those schemes, or that Mr Jahani had failed or was failing to defend the proceeding properly. Of course, Trilogy is a defendant to the Feeder Funds Proceeding as the responsible entity for the WFMIF and it is the appropriate party and representative as trustee of the members of that scheme.

¹⁶ *Corporations Act 2001 (Cth)*, 420(2)(k).

- [19] The liquidator's submissions seemed to be premised on the fact that because the liquidator has not seen the deed of settlement and release he could not assess the possibility that Mr Jahani may not have acted in the best interests of the members of the CPAIF and the ICPAIF. That is not a reason to order that the liquidator be a contradictor in the Feeder Funds Proceeding. There was no warrant in the circumstances as disclosed on the application for an order appointing the liquidator to act as a contradictor for any party to the Feeder Funds Proceeding. Mr Jahani, as the receiver of the scheme property of the CPAIF and the ICPAIF was the proper representative of LMIM as the responsible entity of the CPAIF and the ICPAIF. Under the terms of the deed of release and settlement, it was a condition precedent that Mr Jahani make a successful application to the court in the Feeder Funds Proceeding judicial advice applications that he was justified in entering into the deed of settlement and release. That has now occurred.¹⁷
- [20] Accordingly, I decline to make an order that the liquidator be directed to act as a contradictor in respect of the Feeder Funds Proceeding.

Clear Accounts Proceeding

- [21] The Clear Accounts Proceeding is a proceeding by which LMIM as responsible entity of the FMIF, by Mr Whyte, claims relief against LMIM in its own right, by the liquidator, for alleged breaches of trust by LMIM. On 25 July 2018, the court directed that the liquidator represent the interests of LMIM in its own right in the Clear Accounts Proceeding and ordered that the proceeding be stayed pending completion of the proof of debt process.
- [22] The relevant interests being represented in the Clear Accounts Proceeding must be kept in mind. Mr Whyte claims relief to vindicate alleged rights of the unit holders of the FMIF as beneficiaries of the trust of the scheme property of the FMIF to have LMIM as trustee restore trust assets of the FMIF. Accordingly, no question of the liquidator representing the interests of the unit holders of the FMIF as beneficiaries arises. There is no basis for LMIM to seek appointment as contradictor in the interest of the unit holders.
- [23] The basis of the liquidator applying to be appointed as a contradictor in the Clear Accounts Proceeding seems to be a suggestion that by doing so he may be entitled to receive payment of remuneration and legal expenses to oppose the proceeding from the scheme property of the FMIF. However, orders to that effect are not sought explicitly.
- [24] There are some circumstances where a defendant, including a trustee who has title to or possession of property to which an adverse proprietary claim is made by a plaintiff, may be authorised to utilise some of that property to defend the claim, either by an application for directions under trust legislation,¹⁸ or more generally.¹⁹ But the primary or usual rule is that a trustee who defends a claim for breach of trust brought by or on behalf of the beneficiaries is not entitled to indemnity for their costs when incurred, although if the trustee is successful the trustee's costs would ordinarily be ordered to be paid by the opposite party personally or from the trust estate.²⁰

¹⁷ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

¹⁸ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 94 – 97 [74]-[88].

¹⁹ *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 283-285.

²⁰ *Frost v Bovaird* (2012) 203 FCR 95, 106-109 [69]-[79].

- [25] Thus, if LMIM in its own right, by the liquidator, successfully defends the Clear Accounts Proceeding, it and he might be entitled to an indemnity from the property of the FMIF for any costs and expenses reasonably incurred that are not compensated by an order for costs that might be made in its favour. But that does not, per se, justify making an order in advance to fund the alleged defaulting trustee's costs from the assets of the trust fund and does not justify an order for appointment of the liquidator as a contradictor so as to fund those costs from the trust estate of the scheme property of the FMIF.
- [26] In my view, no appointment of the liquidator as a contradictor for the Clear Accounts Proceeding should be made.

Liquidator's proposed remuneration and expenses regimes

- [27] The liquidator submits that the winding up of the FMIF has been a lengthy and expensive task. In particular, the remuneration of Mr Whyte up to the time of making the first application has exceeded \$14 million, to which must be added the remuneration of the liquidator (including whilst appointed voluntary administrator) and the external receivers.
- [28] The liquidator submits that since all the assets of the FMIF have been realised, apart from any that may be collected in the remaining litigation, any course which lessens the cost burden on the members of the FMIF is desirable and necessary.

Remuneration

- [29] To that end, the liquidator proposes²¹ that if he were appointed to continue the winding up of the FMIF, he would cap his remuneration for the work necessary to wind it up at \$180,000 per annum plus \$200,000 for identified one-off tasks that would need to be completed (both exclusive of GST).
- [30] The liquidator submits that the continued appointment of Mr Whyte apart from continuing the Feeder Funds Proceeding, the Clear Accounts Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding) is unnecessary. As previously mentioned, there is a substantial issue between Mr Whyte as receiver of the FMIF and LMIM in its own right, by the liquidator, as to whether LMIM in its own right is entitled to recover costs or expenses by an indemnity of exoneration from the scheme property of the FMIF, which is the subject of the Clear Accounts Proceeding.
- [31] Notwithstanding this difficulty, the liquidator made submissions as to the differences between his proposals in relation to a number of different subject matters that would remain in the winding up of the FMIF, as matters that will attract remuneration for the insolvency practitioner carrying them out, on the basis that the comparison demonstrates that the liquidator would be more cost effective than Mr Whyte. Perhaps he would be on those matters, but it does not seem to me that is a strong factor in the circumstances viewed overall, because they are relatively minor matters of remuneration and expense in comparison to resolving the remaining litigation.
- [32] Another point that assumed some significance in oral argument was Mr Whyte's concern that if responsibility for the winding up of the FMIF were transferred to the liquidator, except for Mr Whyte's conduct of the remaining litigation matters, the cash funds that are presently under Mr Whyte's control would pass to the liquidator. Mr Whyte's

²¹ By an affidavit of Kelly-Anne Trenfield.

submissions expressed concern about both the practical need he would then have to involve the liquidator in seeking payment of sums on account of the remaining litigation and also that the liquidator has conflicts between LMIM's own interests and LMIM's duties as responsible entity of the other registered schemes on the one hand and the interests of the members of the FMIF. However, before reaching those matters there are a number of other points.

- [33] First, the fundamental purpose of the liquidator's proposal for orders for budgeting, approval and pre-payment of 50 percent of future remuneration is that the liquidator will receive a substantial sum by way of pre-payment of that remuneration from the scheme property of the FMIF for the responsibility of carrying out the remaining work of winding up the FMIF as a registered scheme.
- [34] I have previously decided that because the provisions of the CA require the liquidator of LMIM to call for and adjudicate on proofs of debt of LMIM in LMIM's winding up, and that some of the proofs will be in respect of debts which LMIM incurred as responsible entity and trustee of the FMIF for which LMIM might be entitled to an indemnity by way of exoneration from the property of the FMIF, for expenses properly incurred, the liquidator should call for relevant proofs, adjudicate upon them and notify them to Mr Whyte. That was the subject of the order made on 17 December 2015 and varied on 18 July 2018. Those orders specifically made provision for the liquidator to be reimbursed for his remuneration and expenses of any proofs that should be accepted as debts properly incurred on behalf of the FMIF, although not in advance.
- [35] However, by the Clear Accounts Proceeding, Mr Whyte alleges that the members of the FMIF are entitled to set up claims that they have against LMIM in its own right to restore the trust funds of the FMIF as scheme property, as a defaulting trustee, against any claim by LMIM for an indemnity from the scheme property of the FMIF for expenses properly incurred on behalf of the FMIF. Accordingly, Mr Whyte submits that to make the order for pre-payment of remuneration sought by the liquidator would be to require the members of the FMIF to fund the claims of the creditors, beyond the scope of the existing orders. In making submissions in support of the pre-payment of remuneration order, the liquidator did not deal with this difficulty.
- [36] Second, because the liquidator proposes that Mr Whyte continue to conduct both the Clear Accounts Proceeding on behalf of the unit holders of the FMIF against LMIM in its own right by the liquidator, as well as the Feeder Funds Proceeding and the EY Proceeding (and I infer the Bellpac Proceeding), it will be necessary for Mr Whyte to have access to the cash funds of the FMIF for that purpose and to report to unit holders as to the progress of those proceedings.
- [37] Given these points, there does not seem to be any logical reason why the functions of managing registry issues or general administration otherwise warrant an order generally handing over the conduct of the winding up of the FMIF, including its substantial cash funds, otherwise, to the liquidator. The point is illustrated by Kellie-Anne Trenfield's affidavit that proposes on the liquidator's behalf that for the ongoing litigation the most efficient structure would be for Mr Whyte to have conduct of the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding and,²² on the basis that Mr Whyte should estimate his remuneration and

²² Supreme Court of Queensland, BSC 12317/14.

expenses through to the conclusion of the proceedings and if approved by the court retain the “sum” (50 percent of the approved budget) without having recourse to the remaining funds of the FMIF and on the basis that the liquidator would maintain a liaison with Mr Whyte. That proposal does not seem to me to be practical. I note that after that affidavit was sworn the Bellpac Proceeding went to a full trial in April 2019, but the EY Proceeding has not significantly progressed.

- [38] Even if those reasons were not enough, there are other potential difficulties associated with the liquidator’s proposed regime for budgeting, approving and pre-paying 50 percent of the approved amount of remuneration and expenses.
- [39] The court’s power in respect of the liquidator’s remuneration is that provided for by s 473(3) of the CA that a liquidator is entitled to receive such remuneration by way of percentage or otherwise as is determined under that section.²³ Under s 473, there is no provision for a maximum amount of remuneration where an external administrator is entitled to receive remuneration worked out on a time cost basis.²⁴ As well, in the body of cases developed as to the practices that relate to a liquidator’s remuneration, no case identified in submissions, or of which I am aware, supports an order for a budgeting process that would determine, in effect, that an amount of remuneration is approved by court order but is also subject to a right on the part of the liquidator to apply for further remuneration together with a right of pre-payment of 50 percent (or some other percentage) of the relevant amount, in aid of cash flow. It will be observed that the orders applied for do not propose to cap finally the amount of the liquidator’s remuneration in a way that transfers the risk of the amount proving to be too low to the liquidator, although on the hearing of the application it was proposed that there be a cap on some items of work.
- [40] The driving feature of the liquidator’s proposal in relation to his future remuneration is that he receive pre-payment of remuneration to the extent of 50 percent (or some other percentage) from the scheme property of the FMIF. In my view, for the reasons already mentioned, that is not an appropriate order in this case, assuming there is power to make it in the first place. There is little point in incurring the costs of budgeting and approval only to wait until the final determination of the appropriate remuneration which was not truly fixed.
- [41] As to the schemes other than the FMIF, namely the AIF and ASPF, there is some untidiness as to the precise orders sought by the liquidator. This was introduced by the liquidator apparently applying for an order that he prepare a single budget for more than one scheme. The liquidator’s submissions continued the difficulty by describing the schemes collectively as the “LMIM Estate”, a concept devoid of legal meaning. However, some of the orders applied for can only relate to the FMIF. So far as Mr Whyte is concerned, that is the only scheme in which he was interested. Some orders sought specifically referred to the winding up of the affairs of the FMIF. Yet others did not, yet they would have affected the FMIF. For example, the provision for Mr Whyte’s remuneration to be paid as to 50 percent until the “Conclusion”, a term defined to mean a date not before an affidavit by the liquidator that there is no impediment to the

²³ Although s 473 of the *Corporations Act* 2001 (Cth) was repealed by the *Insolvency Law Reform Act* 2016 (Cth), and the introduction under that Act of the *Insolvency Practice Schedule (Corporations)*, s 1581 of the CA provides that despite the repeal of s 473, the old Act continues to apply in relation to the remuneration of a liquidator of a company appointed before 1 March 2017.

²⁴ Compare s 60-10(4) of the *Insolvency Practice Schedule (Corporations)*.

distribution of funds to members of all schemes, would have had Mr Whyte's remuneration entitlement turn on the progress of the winding up of the AIF and ASPF.

- [42] However, it is unnecessary to separately consider the position of the schemes other than the FMIF, with a view to whether any separate order should be made concerning them. No particular or separate reason to warrant the budgeting, approval and pre-payment orders sought in relation to those schemes was relied upon by the liquidator. In any event, the liquidator submitted on the hearing of the first application that the AIF, ASPF and CPF were within weeks of completion of winding up (in December 2018) and the only property of the ACPAIF and CPAIF were cash and units in the FMIF.

Mr Whyte's remuneration

- [43] As to the liquidator's application for similar orders in relation to Mr Whyte's remuneration, in my view, the driving feature appears to be to make Mr Whyte take the risk of estimating his remuneration for the remaining litigation and to limit his cash flow to 50 percent of that estimate until the final determination of his remuneration.
- [44] The court's power, if any, to order that Mr Whyte's remuneration be determined and paid from the scheme property of the FMIF begins with s 601NF(1) of the CA, by which the court may, by order, appoint a person to take responsibility for ensuring that a registered scheme is wound up in accordance with its constitution and the power under s 601NF(2) to give directions about how the registered scheme is to be wound up. In addition, as in this case, it has been held that in making such an order or orders, the court may appoint the person as receiver of the scheme property of a registered scheme, including orders that confer on the person the powers of a receiver in relation to the property and the scheme, *mutatis mutandis*, to those provided for by s 420(1) and (2) of the CA in relation to a receiver of a company's property. In that context, the court has power, by order, to determine the amount to be paid by way of remuneration to a receiver, as it does in relation to court appointed receivers generally.²⁵
- [45] Accordingly, when Mr Whyte was appointed as a person to ensure that the FMIF was wound up in accordance with its constitution and any orders made under s 601NF(2) of the CA, and he was appointed receiver of the scheme property, an order was made that he be entitled to claim remuneration in respect of the time spent by him and by employees of his firm who performed work in carrying out the appointment at rates and in the sums, from time to time, approved by the court and he be indemnified out of the assets of the FMIF in respect of such remuneration. It is in accordance with that order that Mr Whyte's remuneration has been approved by the court from time to time, and he has indemnified himself from the scheme property of the FMIF.
- [46] Mr Whyte opposes the liquidator's proposed budgeting, approval and 50 percent pre-payment of remuneration regime to the extent that it might apply to him. He consented to appointment on the basis of the existing provisions in the court's order as to his remuneration. Having consulted with the other members of his firm, he does not consent to an arrangement whereby his remuneration is determined in advance by an estimate and paid only as to 50 percent from time to time until a final determination hearing at the completion of the winding up of the FMIF and the other schemes.

²⁵ *ASIC v Letten (No. 7)* (2010) 190 FCR 59, [118]-[119], [270]-[271]; *ASIC v Letten* [2010] FCA 140, [47]; *Ide v Ide* (2004) 184 FLR 44, 49-50; *ASIC v Atlantic 3-Financial (Aust) Pty Ltd* [2004] 1 Qd R 591, 597-598, [27]-[32].

- [47] That is not surprising, for a number of reasons. First, the liquidator's proposal would make Mr Whyte and his firm funders of 50 percent of his remuneration for the balance of the period of the winding up of the FMIF. Second, whereas the liquidator's remuneration for other remaining functions in respect of the FMIF would be relatively simple (leaving to one side any defence of the Clear Accounts Proceeding), Mr Whyte's remaining functions include the conduct of complex commercial litigation, including the EY Proceeding.
- [48] Third, the liquidator's proposal assumes that Mr Whyte's remaining work and remuneration is capable of being accurately estimated and budgeted in advance. That is an unlikely scenario in terms of the remuneration for the remaining litigation. The amount of that remuneration may be greater or lesser to a very significant degree depending on whether (and when) the litigation is compromised or whether it must be or should be fought to the end.
- [49] In support of this part of the application, the liquidator referred in submissions to the estimated remuneration to be incurred by Mr Whyte to 30 June 2019, being in the range between \$690,000 and \$925,000. The point appeared to be that the amount of the liquidator's proposed budget for remuneration was, in comparison, much less. However, the comparison was not of like with like. The remuneration incurred and to be incurred by Mr Whyte may not have included work of gathering other assets of the FMIF, but they included very substantial work of conducting the legal proceedings on foot during that year, including the Feeder Funds Proceeding, the Clear Accounts Proceeding, the Bellpac Proceeding and the EY Proceeding. These are not items covered by the liquidator's proposal for his remuneration.
- [50] Although the liquidator referred to the cost and delay of the winding up of the FMIF to date, Mr Whyte pointed out, first, that the remuneration he has sought and received has been approved by the court in ten successive six monthly applications without reduction, and that his ongoing remuneration is the subject of approval applications made to the same judge.
- [51] Second, as to delay, Mr Whyte pointed out that although delay is raised in the liquidator's written submissions, no example or instance of delay on Mr Whyte's part was referred to by the liquidator in written or oral argument.
- [52] ASIC has supported Mr Whyte's position by correspondence. It stated that it was concerned that the liquidator's motivation for filing the application might be to prevent Mr Whyte from seeking remuneration as might properly be incurred by him in his capacity as the person charged with the responsibility of winding up the FMIF and that having reviewed the application and the material filed in support of Mr Whyte's then most recent application for remuneration, ASIC did not seek to be heard on the application, consistent with ASIC's position in respect of each of the previous applications for remuneration made by Mr Whyte.
- [53] Neither Mr Jahani nor Trilogy support the liquidator's application on the proposed budget, approval and 50 percent pre-payment of remuneration proposal.
- [54] In my view, nearly all of the relevant circumstances point against the proposed orders for budgeting, approval and pre-payment of the future remuneration of Mr Whyte's remuneration and no order to that effect should be made in the circumstances of this case.

Liquidator's expenses

- [55] In substance, the liquidator's proposal for his expenses is that, like remuneration, they be budgeted and pre-approved and then approved amounts be paid monthly in advance to meet expenses. In my view, in substance, this too, is a pre-payment regime based on forecasts of expenses, driven by the liquidator's lack of funds in the winding up of LMIM generally and in respect of the FMIF, and other insolvent schemes or funds, in particular.
- [56] Although the point is not as clear in relation to expenses other than legal expenses of conducting outstanding legal proceedings, in my view, there is no real justification for the budgeting, approval and pre-payment of the liquidator's expenses either, in the circumstances of this case. The amounts involved are relatively less than the expenses by way of legal expenses of the relevant proceedings, which the liquidator does not propose to conduct. Overall, it is difficult to see the attraction in the liquidator's proposal, in relation to the FMIF in particular.

Mr Whyte's expenses

- [57] In support of this part of the application, the liquidator referred to the financial statements for the FMIF for the year ended 30 June 2018, that show Mr Whyte's fees and outlays, for investigations, litigation and non-operating costs as \$1,0007,573 and operating costs of the FMIF as \$1,231,477. However, there was no evidence as to whether any of those amounts is excessive, or unjustified, or what was included in them beyond those descriptions.
- [58] Mr Whyte relied on the fact that his expenses were approved for payment by the secured creditor's receiver up to the point in time after the hearing of the application when they retired and they are subject to approval by the custodian of the FMIF.
- [59] I have previously summarised the source of the court's powers and the orders under which he was appointed in relation to Mr Whyte's remuneration. Similar points apply to his expenses.
- [60] Mr Whyte's expenses will be of a different order and complexity to those proposed by the liquidator, because he retains responsibility for the expenses associated with the remaining litigation that will be significant, in particular because of the likely amounts of legal fees.
- [61] Mr Whyte also estimated his expenses for the period to 30 June 2019. However, there is no point in setting the amounts out in these reasons, because they were estimated on the basis of assumptions as to settlement of the EY Proceeding at mediation during that six month period. That possibility did not come about. The EY Proceeding remains in the interlocutory stages of disputes about the pleadings. Inevitably, Mr Whyte will have incurred further expenses than those estimated at December 2018. The example illustrates the lack of utility in attempting to budget, approve and pre-pay 50 percent of the approved budgeted expenses on the footing that until the final determination for the winding up of the FMIF, Mr Whyte should be limited to the budgeted and approved amount.
- [62] In my view, the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism should not be adopted in relation to Mr Whyte's expenses.

Members registry

- [63] Part of the orders sought by the liquidator would see control of and responsibility for the members' registry for the FMIF returned to the liquidator. Mr Whyte presently manages those functions for the FMIF and keeps unit holders informed of the progress of the winding up of the FMIF in regular reports. That he does so is a condition of the relief that ASIC has granted from the reporting requirements that would otherwise apply to the FMIF under Chapter 2M of the CA. To transfer the registry function to the liquidator would involve a transactional cost, although the amount may not be great (Ms Trenfield suggests \$10,000). It is suggested on the evidence that the liquidator would obtain ongoing registry services for a lower cost than Mr Whyte does, but the greatest expenses associated with this function are the costs of reports to unit holders from time to time. If Mr Whyte continues to manage the remaining litigation, he or his staff would have to provide reports to the liquidator or his staff who would then have to consider the content of the relevant reports before communicating them to unit holders. In my view, this is unlikely to lead to cost savings to the unit holders of the FMIF.

Audit of the FMIF

- [64] Although ASIC has, in effect, relieved the liquidator and Mr Whyte from any obligation to carry out ongoing periodical audits of the FMIF under Chapter 2M of the CA, at the end of the winding up of the FMIF it will be necessary for there to be a final audit. Ms Trenfield estimates the cost of doing so to be in the region of \$10,000 to \$20,000, so it is not a major cost. At present, Mr Whyte is not appointed to carry out that task. However, assuming it is to be carried out by one of the protagonists to this proceeding, it is not a major prospective saving of expense for the liquidator to carry out the function.
- [65] In substance, the point about the liquidator's expenses of winding up the FMIF (that do not include the expenses associated with the remaining litigation) is that those expenses are not likely to be significant in the overall scale of things and, so viewed, they are not a reason to adopt the liquidator's proposed budgeting, approval and pre-payment of 50 percent mechanism.

Limiting Mr Whyte's appointment

- [66] Leaving aside the liquidator's proposal for budgeting, approval and pre-payment of 50 percent of both his remuneration and expenses and Mr Whyte's remuneration and expenses, a shift in a number of the functions and responsibilities for some of the proposals previously discussed would follow from an order that limits the future functions of Mr Whyte to continuing and completion of the remaining litigation.
- [67] First, Mr Whyte apprehends that he would be required to transfer the cash balance in the accounts under his control to the liquidator. Second, Mr Whyte points out that the liquidator has a position of conflict in relation to LMIM's claims for indemnity from the scheme property of the FMIF arising out of the Clear Accounts Proceeding, as well as in respect of the apportionment or allocation as between the other registered schemes of which LMIM is the responsible entity and the FMIF for common items of remuneration and expenses. Third, in particular, Mr Whyte would no longer have the function to consider and, if he thinks appropriate on behalf of members of the FMIF, to oppose orders sought by the liquidator in respect of claims for indemnity from the scheme property of the FMIF for his remuneration or expenses.

- [68] In my view, these reasons remain as reasons why Mr Whyte's appointment to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the orders of the court made under s 601NF(2) of the CA should not be limited to continuing and completion of the remaining litigation. Subject to one consideration, the reasons why Mr Whyte was appointed in the first place continue and would suggest that he should take the winding up of the FMIF towards completion, to the extent that he can do so.
- [69] The exception is that, as I have previously decided, Mr Whyte cannot complete the process of the winding up to the extent that it remains the statutory function of the liquidator to call for proofs of debt, to consider whether LMIM has an entitlement to indemnity from the funds of the FMIF for debts admitted to proof and to apply for an order for indemnity in respect of those amounts in accordance with paragraphs 2 and 3 of the court's order made on 18 July 2018.
- [70] However, those functions are not, in my view, a reason why Mr Whyte's appointment should be limited.
- [71] Mr Jahani opposes any order that would limit Mr Whyte's functions or powers under the existing orders as endangering the performance of the terms of the settlement of the Feeder Funds Proceeding, which contemplate Mr Whyte making an interim distribution in accordance with the second application for an interim distribution order.
- [72] In the result, in my view, the liquidator's application should be dismissed in relation to the scope of Mr Whyte's appointment and functions in relation to the FMIF.

Second application - interim distribution

- [73] Mr Whyte makes the second application, for an interim distribution to members of the FMIF, under s 601NF(2) of the CA. First, he seeks an order that he is authorised to make an interim distribution from the property of the FMIF of up to \$40 million among the members of the FMIF pursuant to cl 16.7 of the constitution of the FMIF. Alternatively, if any of the conditions precedent to the deed of settlement and release of the Feeder Funds Proceeding have not been satisfied or will not be satisfied by making the interim distribution, Mr Whyte applies for an order that he is authorised to withhold payment of the interim distribution to the responsible entities or the custodians of the Feeder Funds.
- [74] Second, Mr Whyte seeks a declaration that each member holding Class C units in the FMIF, having invested in one of the non-Australian dollar currency hedged fixed term investment options for investment, is entitled to be paid amounts in the winding up of the FMIF calculated by reference to that member's unit balance recorded in the investor master register as adjusted for the foreign exchange spot rate between the investment currency recorded in the investor master register and the Australian dollar prevailing as at the time of each distribution or an alternative date.
- [75] On the hearing of the application, Mr Whyte and Trilogy appeared, both in support of the application. LMIM as responsible entity of the CPAIF and the ICPAIF by Mr Jahani did not appear but provided a letter from his solicitors supporting the application. No contradictor appeared.

- [76] Trilogy's position was that although it supported the application, no order should be made on it until after the Feeder Funds Proceeding judicial advice applications had been decided. That was also the position of Mr Jahani, in effect. On Mr Whyte's part, there was no opposition to the court hearing the application for an interim distribution, but deferring any decision until after the outcome of the Feeder Funds Proceeding judicial advice applications was known. Accordingly, I proceeded to hear the application and at the conclusion of the hearing adjourned it to a date to be fixed. Since the hearing and decision of the other applications no party or person has sought a further hearing.
- [77] Mr Whyte identified five issues which may have affected the orders to be made on the second application. First, he referred to the liquidator's application for directions, including to narrow the scope of Mr Whyte's functions which had then been heard but not determined. Mr Whyte's position was that the second application should be heard and determined at the same time as the liquidator's application. In making this decision, I have done so.
- [78] Second, Mr Whyte proposed to make one of the applications that formed the Feeder Funds Proceeding judicial advice applications. That concern was met by adjourning the determination of this application until the outcome of those applications was known, as it now is.²⁶
- [79] Third, Mr Whyte was concerned as to the timing of the decisions upon the second application and the Feeder Funds Proceeding judicial advice applications because of the time for performance of conditions precedent under the deed of settlement and release, but as previously discussed, that concern is met by this application being decided after the Feeder Funds Proceeding judicial advice applications.
- [80] Fourth, Mr Whyte identified that he is not specifically named as a relevant person or party who has standing to apply for an order under s 601NF(2) or s 601NF(3) of the CA. However, in my view, there is no difficulty of standing for him to make the interim distribution application. Mr Whyte was appointed as a person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders under s 601NF(2). Clause 16.7(c) of the constitution of the FMIF provides for distributions of the net proceeds of realisations in the winding up. Given the breadth of the power of the court, by order, to give directions about how the registered scheme is to be wound up under s 601NF(2), it is implied that a person appointed under s 601NF(1) has the power to apply for directions about their appointment, particularly where the appointment is made as well to take possession of assets as a court appointed receiver. In any event, in this proceeding, prior directions were made by the order made on 17 December 2015 giving the parties liberty to apply, including Mr Whyte.
- [81] Fifth, in the event that an interim distribution is authorised by order, Mr Whyte points to a degree of uncertainty as to the entitlement of the Class C unit holders who made investments in the FMIF in foreign currencies. I deal with that question later in these reasons.
- [82] In *Park v Whyte*,²⁷ I found that LMIM's power as responsible entity to make distributions in the winding up of the FMIF under cl 16.7(c) of the constitution of the FMIF was

²⁶ *Bruce v LM Investment Management Limited (in liq) & Ors* [2019] QSC 126.

²⁷ [2015] QSC 283, [100] – [106].

suspended because as a result of the orders appointing Mr Whyte, LMIM was not in possession of the scheme property. I held further that Mr Whyte was under no obligation to return the property of the FMIF to the liquidator once he had completed collecting and realising the assets of the FMIF, without an order of the court, and that the orders previously made appointing him receiver did not authorise him to make distributions to the members of the FMIF, without an order of the court. By the order made on 17 December 2015, I directed that LMIM shall not be responsible for and was not required to discharge the functions, duties and responsibilities set out in cl 16.7(c) and that Mr Whyte was directed not to make any distribution to the members of the FMIF without the authority or further order of the court. By this second application, Mr Whyte seeks that authority.

- [83] The summary of the circumstances under which he does so is that the cash balance under his control exceeds the amount required to satisfy any of the actual and possible contingent liabilities of the FMIF, as estimated by Mr Whyte, by up to \$40 million. The amount of cash in bank was approximately \$65 million against which the actual liabilities were \$2,213,000, approximately, and possible contingent liabilities estimated on a realistic worst case scenario might amount to \$21,773,000, approximately. In addition to that assessment of liabilities, there is a further possible contingent liability in respect of a proof of debt lodged by Ernst & Young (“EY”) with the liquidator dated 20 December 2018. It will be necessary to explain how that possible alleged liability arises later. But the short of it is that Mr Whyte considers that it does not substantially affect whether the proposed interim distribution should be made because the amount of any liability in respect of that proof will be no more than the amount of a corresponding asset that will be payable by EY to LMIM by Mr Whyte as a judgment sum on LMIM’s claim against EY as auditors in the EY Proceeding. That is, Mr Whyte assesses the amount of the contingent liability to be a zero sum game when taken together with the corresponding possibility of an increase in the property of the FMIF by litigation recovery from EY.
- [84] There is a difficulty that was faced by Mr Whyte in the extent of the evidence that was filed in support of the second application. It is that the precise amount which Mr Whyte may be justified in distributing depends upon matters which are confidential and could not be placed before the court in open court where they may come to the attention of a possible trial judge of the Feeder Funds Proceeding or the other remaining litigation. Accordingly, those matters were dealt with by disclosure in Mr Whyte’s application made in the Feeder Funds Proceeding judicial advice applications before Mullins J.
- [85] As to the potential difficulty in making appropriate payments to the Class C unit holders under the proposed interim distribution, Mr Whyte identified two points. First, the rights of Class C unit holders are not defined in the constitution of the FMIF and they do not appear to have been defined in any deed or similar document executed by LMIM as the responsible entity. The only relevant documents appears to be a product disclosure statement dated 10 April 2008, as supplemented. Second, the product disclosure statement describes the rights of Class C unit holders in a manner that admits of more than one possible construction. It is clear enough, however, that Class C units were issued with the intention of protecting those unit holders from foreign exchange fluctuations as against the Australian dollar, as at the time of relevant distributions.

[87] It is appropriate to begin a more detailed exposition with the legal framework for making a distribution in the winding up of the FMIF. The winding up is governed by the constitution of the scheme and any directions made by the Court under s 601NF(2).²⁸ Clause 16.7 of the constitution of the FMIF is as follows:

“Subject to the provisions of this clause 16 upon winding up the scheme the RE must:

- (a) realise the assets of the scheme property;
- (b) pay all liabilities of the RE in its capacity as trustee of the scheme including, but not limited to, liabilities owed to any member who is a creditor of the scheme except where such liability is a unit holder liability;
- (c) subject to any special rights or restrictions attached to any unit, distribute the net proceeds of realisation among the members in the same proportion specified in cl 12.4;
- (d) the members must pay the costs and expenses of a distribution of assets under cl 16.7(c) in the same proportion;
- (e) the RE may postpone the realisation of the scheme property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement;
- (f) the RE may retain for as long as it thinks fit any part of the scheme property which in its opinion may be required to meet any actual or contingent liability of the scheme;
- (g) the RE must distribute among the members in accordance with cl 16.7 anything retained under cl 16.7(f) which is subsequently not required.”

²⁸ *Re Stacks Managed Investments Ltd* (2005) 54 ACSR 466, [45] – [46].

- [89] In February and March 2019, the FMIF had cash at bank of approximately \$65 million. As at that time, there were actual and contingent liabilities. Mr Whyte's estimate of the actual and contingent liabilities²⁹ in March 2019 were as follows:

Description	\$ Amount
Actual liabilities	\$2,213,000.00
<u>Contingent Liabilities</u>	
Creditor indemnity claims	\$949,497.72
Exit entitlements relating to former retirement village assets (approximately)	\$5,000,000.00
Potential claims by the liquidator of LMIM	\$2,043,889.89
Non-litigation expenses and remuneration of Mr Whyte	\$1,800,000.00
The Feeder Funds Proceeding	\$1,100,000.00
EY Proceeding	\$2,450,000.00
Bellpac Proceeding	\$8,200,000.00
Lamb Bankruptcy Proceedings	\$230,000.00
Total:	\$23,986,387.61

- [90] Mr Whyte opined that these amounts are not his best estimate of the extent of the liabilities but are an assessment of a realistic worst case scenario in respect of those liabilities. Taking them into account, Mr Whyte opined that it is possible to distribute a sum of up to \$40 million to the unit holders of the FMIF, subject to his assessment of the appropriateness of the amount of contingent liabilities under his control relating to the remaining litigation to recover funds for the benefit of the FMIF. Mr Whyte provides further information as to the categories of contingent liabilities. They include the following matters.

Creditor indemnity claims

- [91] Under the 17 December 2015 order, as varied on 18 July 2018, the liquidator was directed to ascertain the debts and claims against LMIM as responsible entity for which LMIM claimed indemnity from the FMIF and to notify the same to Mr Whyte. The liquidator called for proofs of debt in early September 2018, with a due date of 2 October 2018. The liquidator subsequently advised Mr Whyte that proofs of debt had been received from EY in the amount of \$158,896.51 and Norton Rose Fulbright Australia in the sum of \$315,601.21, totalling \$474,497.72, together with provision for interest at the rate of 8 percent under s 563B of the CA for the possible relevant period of \$300,000. Mr Whyte originally allowed \$774,497.72 in respect of the actual liabilities, but increased that allowance to \$949,497.72 as at March 2019.

²⁹ Excluding some possible contingent liabilities over which he had control.

Exit entitlements relating to retirement villages

- [92] The FMIF held securities over a number of retirement villages which were realised by sale by Mr Whyte and the externally appointed receiver of the secured creditor. There were five relevant retirement villages. Under each of the agreements for sale, the incoming owner and operator of the relevant retirement village provided an indemnity to LMIM as responsible entity of the FMIF for the potential obligation to pay any exit entitlement that may be due to a resident or the resident's estate on exit from the village. Under the legislation which applies, the liability to pay exit entitlements may in some circumstances be enforced against LMIM as the responsible entity (or the custodian) as the operator of the village at the time when the resident's contract was entered into. Accordingly, there is a possibility of liability of LMIM as responsible entity, in the event that the purchaser does not honour the indemnity. The liability is not a likely one, for the reasons that the retirement villages were sold to operators who Mr Whyte believed then and still believes are financially sound and that on average the residents of retirement villages stay for a period of approximately five years and any exit entitlements are met or repaid thereafter. To date, there has been no exit liability that LMIM as responsible entity by Mr Whyte (or the custodian) has been called upon to pay.
- [93] Mr Whyte has made an estimate of what is, in his view, a realistic worst case scenario that the amount of any such liability could be up to \$5 million on the assumption that there might be a shortfall payable for up to 50 percent of the exit entitlements that were contributed by residents.

Liquidator's remuneration and expenses

- [94] On 6 September 2018 and 3 October 2018, the court heard the liquidator's second application for remuneration to be paid from the property of the FMIF in the sum of \$743,889.89. Although Mr Whyte opposed the orders sought to determine the remuneration in the amounts applied for or that they should be payable from the assets of the FMIF, he has made a full allowance of the amounts claimed as an amount of the property of the FMIF that should be retained.
- [95] Mr Whyte also anticipates the possibility of further applications by the liquidator for payment of remuneration and expenses from the property of the FMIF, including an expressed intention by the liquidator to reallocate approximately \$1.6 million in unpaid "corporate" expenses of LMIM, consisting principally of unpaid legal costs and outlays, to the various funds of which it is the responsible entity and to make a claim for a proportion of those expenses from the FMIF. Mr Whyte has estimated that 25 percent of that amount should be retained on the assumption that the amount would reflect an equal apportionment between the various funds of which LMIM is the responsible entity.
- [96] Further, Mr Whyte proposes to retain an amount against the liquidator's remuneration and expenses of the first application for directions dealt with by these reasons as another potential liability to be met from the assets of the FMIF.
- [97] Lastly, Mr Whyte has estimated the liquidator's expenses of completing the process of ascertaining creditor indemnity claims against the FMIF under the order of 17 December 2015 as varied on 18 July 2017, maintaining LMIM's Australian Financial Services Licence, carrying out a final audit of the FMIF (assuming that function is not transferred to Mr Whyte) and making a further application or applications for recovery of

remuneration and expenses from the FMIF and proposes that amounts be retained for those items.

[98] The summary of the relevant amounts is as follows:

Description	\$ Amount
Liquidator's remuneration claim heard in September 2018	\$743,889.89
Liquidator's further legal expenses notified in the remuneration application but not yet claimed	\$400,000
Liquidator's other remuneration and expenses recoverable to the conclusion of the winding up of the FMIF	\$200,000
Liquidator's remuneration and legal costs of the September 2018 remuneration application	\$200,000
Liquidator's remuneration and legal costs of the Directions Application	\$200,000
Liquidator's remuneration and legal costs of further applications for recovery of remuneration and expenses from the FMIF	\$300,000.00
Total:	\$2,043,889.89

Mr Whyte's remuneration and expenses

[99] Mr Whyte's summary of his further remuneration and expenses to the end of the winding up of the FMIF is as follows:

Description	\$ Amount
Ongoing administration	\$1 million
Completing the Proof of Debt Process	\$50,000
Responding to further claims by the Liquidator for remuneration and expenses	\$100,000
Applying for authority to make a final distribution	\$50,000
Further applications for approval of remuneration	\$500,000
Finalising the appointment	\$100,000
Total:	\$1,800,000

Feeder Funds Proceeding

- [100] Although the Feeder Funds Proceeding has been compromised, and it is proposed that the deed of settlement and release be carried into effect, Mr Whyte has estimated the costs that may be associated with the Feeder Funds Proceeding on the assumption that the compromise is not carried into effect. The amount of the potential contingent liabilities in that event were estimated by him as follows:

Description	\$ Amount
Remuneration and legal expenses of the application to court for judicial advice	\$100,000
Liability under adverse costs orders for costs of Mr Jahani and Trilogy of the litigation	\$1 million
Total:	\$1,100,000

EY Proceeding

- [101] Mr Whyte made an estimate of the contingent liability in respect of the EY Proceeding as follows:

Description	\$ Amount
Remuneration and legal expenses up to and including mediation	\$350,000
Legal expenses and remuneration of an application for judicial advice	\$100,000
Liability under adverse costs order for costs of the EY Proceeding to date	\$2 million
Total:	\$2,450,000

Bellpac Proceeding

- [102] Mr Whyte estimated the contingent liabilities for the Bellpac proceeding as follows:

Description	\$ Amount
Mr Whyte's remuneration and legal expenses up to and including trial	\$700,000
Liability under an adverse costs order, if claim is unsuccessful	\$7.5 million
Total:	\$8,200,000

Bankrupt Estate of Ross Lamb

- [103] Mr Whyte estimated the contingent liabilities with respect to Mr Lamb's bankruptcy as follows:

Description	\$ Amount
Trustee's remuneration and legal expenses in relation to public examinations	\$200,000
Mr Whyte's remuneration and expenses	\$30,000
Total:	\$230,000

- [104] In my view, the amounts estimated for these contingent liabilities are reasonable.

Class C unit holders

- [105] From 2008, 171 unit holders invested in the FMIF in a foreign currency under a product disclosure statement issued on 10 April 2008 as supplemented on a later occasion. However, throughout the relevant time, units in the FMIF were valued for other investors in the FMIF upon subscription and redemption in Australian dollars ("AUD") at \$1. The financial statements of the FMIF identify the foreign currency investors as holding "Class C" units. They represent between 2 percent and 3 percent of units in the FMIF.
- [106] When a unit holder invested in the FMIF in a foreign currency, according to the product disclosure statement, the amount accepted was converted into AUD and units at the foreign exchange rate as at the date of the investment.
- [107] However, from 2011, a unit holder who invested in a foreign currency under the product disclosure statement was recorded in the register of unit holders as a unit holder in units of the foreign currency. The investments were not recorded as converted into AUD at the spot rate of foreign exchange as at the date of the investment, or reinvestment. Instead, by choosing an "Effective Date" of 29 November 2012, an "Effective Unit Price" was set using the spot rate of foreign currency exchange in AUD on that date. I was informed that the intention was that by multiplying the "Unit Balance" recorded in the foreign currency "units" in the register by the "Effective Unit Price" as at the "Effective Date", a "Balance in Currency" of the foreign currency was recorded and a "Balance in AUD" was also recorded as the amount required in AUD to pay the investor's "Balance in Currency". I confess that, having closely examined the copies of the sample records in evidence, the methodology employed in compiling the relevant entries did not make itself clear to me.
- [108] In any event, the purported effect of the arrangements, according to the product disclosure statement, was that if an investment in units in the FMIF was made in a foreign currency, a conversion into AUD from time to time would result in a fluctuation of the unit holdings of the foreign investor according to the exchange rate. Against this outcome, LMIM as the responsible entity of the FMIF agreed with the relevant investor under the terms of the product disclosure statement to enter into a forward foreign exchange contract between the foreign currency and the AUD, thereby hedging the investment made by the foreign currency investor. However, from about the time of the order to wind up the

FMIF made in August 2015, forward foreign exchange contracts have not been maintained during the winding up.

- [109] Turning to the terms of the constitution of the FMIF, cl 3.2 provides for different classes of units as follows:

“Different classes (and subclasses) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE in its complete discretion. Such rights and obligations may, but need not be, referred to in the PDS. If the RE determines in relation to particular units, the terms of issue of those units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such units. Without limitation, the RE may distribute the distributable income for any period between different classes on a basis other than proportionately, provided that the RE treats the different classes fairly.”

- [110] Clause 3.4 provides:

“At any time, all the units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.”

- [111] There is no evidence that LMIM as responsible entity of the FMIF recorded a determination under cl 3.2 in respect of Class C units.

- [112] However, the product disclosure statement issued by LMIM as responsible entity of the FMIF on 10 April 2008 offered “non-AUD dollar currency hedged fixed term investment options” for investment in the FMIF. It stated:

- (a) “The fund currency hedges a non-Australian dollar investment through the use of foreign forward exchange contracts (“FFEC”).”
- (b) “On acceptance of investment funds and the completed application form, the relevant currency is converted at the prevailing spot market rate into Australian dollars and units in the fund issued. The fund simultaneously enters into a FFEC. The FFEC requires the fund to deliver an amount of AUD in exchange for an amount of the relevant foreign currency at a specific time in the future (the specific time is equivalent to the investment term) at a pre-determined exchange rate (forward rate). At the end of the investment period the fund converts the earnings of the investor into the relevant foreign currency at the forward foreign exchange rate”.
- (c) “Non-AUD investment terms for all currencies commence on the day the manager settles the FFEC”.
- (d) “At the end of the relevant investment term, the investor’s original investment amount and interest distribution (unless the investor elects to have the interest distribution paid direct to the account nominated on the application form), are automatically reinvested and re-hedged in the originally nominated currency for further 1 month investment terms until the investor provides the manager with longer investment term instructions or a written withdrawal notice.”
- (e) “For all non-AUD dollar investments the manager will continue to hedge (on a 1 monthly basis) the currency exposure of these investments (in the event of a delay in payment of a redemption or the suspension of redemptions).”

[113] On page 26 the product disclosure statement provided further:

“Investors should however, be aware that **any delay or shortfall in income or capital payments from the fund may result in a loss for the fund due to breaking a FFEC**. In such an event, the investment will not be currency hedged and income and/or capital may be impacted.” (emphasis added)

[114] The overall intention pursuant to the product disclosure statement, in my view, was that an investor who invested in the FMIF in a foreign currency would be protected against changes in the exchange rate from the prevailing spot market rate as at the date the units were issued by LMIM taking out a forward foreign exchange contract between the AUD and the foreign currency. Even so, by the terms of the product disclosure statement, the underlying assumption or provision was that the investment would be converted into units in the FMIF issued in AUD at the prevailing spot market rate at the time of investment.

[115] Accordingly, on maturity, it was intended that the foreign currency investor would be entitled to a distribution of an underlying amount in AUD at that date and an adjustment of that amount on conversion into the foreign currency by the net gain or loss made on the forward foreign exchange contract entered into as a hedge to cover the investment for the period of the investment. These arrangements, in my view, reflected the underlying intention that an investment in the FMIF was to be made in units issued in an AUD value and number, although made in a foreign currency. This conclusion is consistent with the contextual circumstances that the scheme property of the FMIF was invested in loans made to borrowers in AUD repayable with interest in AUD and secured by first mortgage over Australian assets. Investors in the scheme were necessarily exposed to the financial risk of it earning income and maintaining capital in AUD only.

[116] Mr Whyte submits that the arrangements disclosed by the product disclosure statement have the effect that at the end of the period of the investment, an investor in foreign currency would be entitled to an increased or decreased amount reflected in a different number of units measured in AUD than the initial investment. I do not agree. The number of units that an investor in a foreign currency received should have been the number of units into which the foreign currency converted as at the date of investment and issue of the units. The adjustment of the amount of the redemption value of those units in AUD under the arrangements provided for by the product disclosure statement was to be made by payment at redemption in the foreign currency of an amount that reflected the AUD amount of the value of the units to be redeemed at the date of redemption together with the adjustment, whether negative or positive, represented by the forward foreign exchange contract made to sell the AUD into the foreign currency.

[117] If those conclusions are correct, it follows logically that a change occurred in the rights of investors in foreign currency who were Class C unit holders when it was ordered that the FMIF be wound up on 8 and 21 August 2013. From that time, there was no reinvestment of the interests of any investor in foreign currency or redemption made under the arrangements provided for under the product disclosure statement. Any existing unexpired investment terms came and went without repayment and without any continuing hedging cover against the nominal value of those investments. I was not informed of the outcome for LMIM when the relevant hedge covers ceased.

[118] In my view, the relevant date at which a foreign investor's unit holding is to be ascertained is either the date at which they last invested in the FMIF at the conversion rate of the

foreign currency into AUD or the date on which it was ordered that the FMIF be wound up at the conversion rate of the foreign currency into AUD as at that date. The conversion of the foreign currency into AUD as at that date yields the number of units to which the investor is entitled and forms the basis of their rateable entitlement to receive distributions from the FMIF as against other members, including other Class C unit holders and unit holders who did not invest in a foreign currency.

- [119] Although arguments may be advanced in support of either of those alternatives, in my view, the date of the order that the FMIF be wound up is the better date. Until then, the terms of the product disclosure statement expressly required that the forward foreign exchange contracts be in place, notwithstanding that there was a suspension of redemptions from an earlier date. However, the effect of the order that the FMIF be wound up was to change the business of the FMIF, so that the assets were to be realised, the debts paid and the net proceeds of realisation are to be distributed to the unit holders in the rateable proportions that applied among them.
- [120] As between the AUD investors and the foreign currency investors, the calculation of the rateable proportions requires that a choice be made of the date at which the conversion of the foreign currency investor's investments should be made.
- [121] The complication lies in the circumstance that LMIM as responsible entity ceased to observe the contractual requirement to investors in Class C units that it would hedge the position of those unit holders against movements between the AUD and the foreign currency by forward foreign exchange contracts. However, LMIM's breach of contract in that respect does not alter the unit entitlement of the Class C members in comparison to the other classes of members under the terms of the constitution of the FMIF. Unless the constitutional arrangements expressly or impliedly provided that in the event of the winding up the investors in a foreign currency were to have an entitlement to a greater distribution based on the arrangements made under the product disclosure statement, the unit entitlements of the members should be treated as crystallised as at that date. The product disclosure statement did not contemplate a greater entitlement in the winding up. To the contrary, it expressly contemplated that a shortfall in income and capital might expose a foreign currency investor to the risk of a break in a forward foreign exchange contract, that the investment would not thereafter be currency hedged and that income and capital may be impacted.
- [122] Accordingly, in my view, distributions to Class C members should be made on the footing that their entitlements to units are to be ascertained by reference to the appropriate calculation of units in AUD utilising the spot exchange rate for the investment of foreign currency as at the date of order made for the winding up of the FMIF.

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SUPREME COURT
OF QUEENSLAND

SUPREME COURT OF QUEENSLAND

- 4 DEC 2019

REGISTRY: Brisbane
NUMBER: BS3508/15

FILED
BRISBANE

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

AND

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

AND

First Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

AND

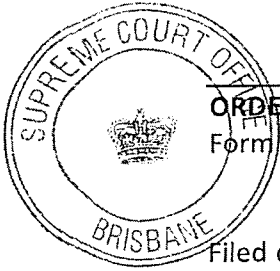
Second Respondent: SAID JAHANI IN HIS CAPACITY AS RECEIVER AND MANAGER OF THE ASSETS, UNDERTAKINGS, RIGHTS AND INTERESTS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 AS THE RESPONSIBLE ENTITY OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 AND THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868

ORDER

Before: Justice Jackson

Date: 2 October 2019

Initiating document: Applications filed 10 October 2018 and 1 February 2019



ORDER
Form 59 R.661

Filed on behalf of the First Respondent

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

ON THE APPLICATION FILED 10 OCTOBER 2018 THE ORDER OF THE COURT IS THAT:

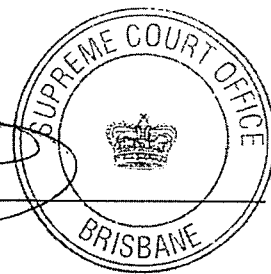
1. The application is dismissed.
2. The parties exchange and file written submissions as to costs by 8 October 2019.

ON THE APPLICATION FILED 1 FEBRUARY 2019 THE ORDER OF THE COURT IS THAT:

1. The first respondent is authorised and empowered to make an interim distribution from the property of the LM First Mortgage Income Fund ("FMIF") among the members of the FMIF of up to \$40 million.
2. It is declared that each member holding "Class C" Units in the FMIF is entitled to be paid in the winding up of the FMIF amounts calculated by reference to the calculation of that member's units in the foreign currency of investment as adjusted for the foreign exchange spot rate between the currency of investment and the Australian dollar prevailing at the date of the commencement of the winding up of the FMIF.
3. The first respondent's costs of the application be costs in the winding up of the FMIF to be assessed on the indemnity basis and paid to the first respondent from the property of the FMIF.
4. Trilogy exchange and file with any opposite party submissions as to costs by 8 October 2019.

Signed: _____

Deputy Registrar



7 MAR 2019

SUPREME COURT OF QUEENSLAND

FILED
BRISBANE

REGISTRY: BRISBANE
NUMBER: 12317/14

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

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

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

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

ORDER

Before: Justice Jackson

Date: 27 March 2019

ORDER
Filed on Behalf of the Plaintiff
Form 59 Rule 661

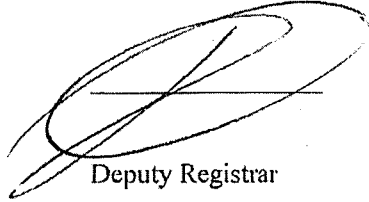
GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3231 5850

Initiating document: Claim filed 19 December 2014 and Third Further Amended Statement of Claim filed 1 February 2019.

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. The plaintiff have leave to discontinue the whole of its claim against the eighth defendant.
2. As between the plaintiff and the eighth defendant, there be no order as to costs of the proceeding.

Signed:



Deputy Registrar

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

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


AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

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

ORDER

Before: The Honourable Justice Jackson

Date: 6 December 2019

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. The plaintiff pay the first, second, third, fourth and sixth defendants' costs of the proceeding.

SUPREME COURT OF QUEENSLAND

- 4 AUG 2020

FILED
BRISBANE

REGISTRY:
NUMBER:

Brisbane
BS3508/2015

**IN THE MATTER OF LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)**

First Applicant: **JOHN RICHARD PARK AS LIQUIDATOR OF LM INVESTMENT
MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS
AND MANAGERS APPOINTED) ACN 007 208 461 THE
RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE
INCOME FUND ARSN 089 343 288**

AND ANOTHER

First Respondent: **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE
THE WINDING UP OF THE LM FIRST MORTGAGE INCOME
FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF
THE CORPORATIONS ACT 2001**

AND ANOTHER

ORDER

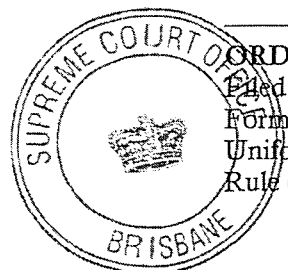
Before: Jackson J

Date: 28 February 2020

Initiating document: Application filed 24 January 2020 [Court File No. 243]

**BY CONSENT, UPON THE APPLICANTS' UNDERTAKING NOT TO TAKE ANY
STEPS TO RECOVER OR ENFORCE ANY ENTITLEMENT TO ANY OF THE COSTS
OF THE SEVENTH DEFENDANT IN SUPREME COURT PROCEEDING BS 12317 OF
2014 AGAINST THE PLAINTIFF, THE ORDER OF THE COURT IS THAT:**

1. The First Applicant be paid the sum of \$157,107.81 from the scheme property of the LM First Mortgage Income Fund ("FMIF") being the legal costs of the Second Applicant as the Seventh Defendant in Supreme Court proceeding no BS12317 of 2014.
2. The First Respondent shall pay the amount referred to in paragraph 1 above from the



ORDER

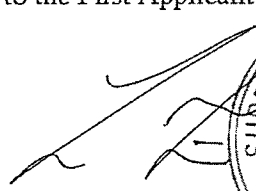
Filed on behalf of the applicants
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

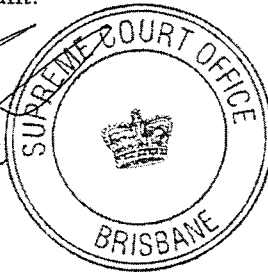
Russells
Level 18, 300 Queen Street
Brisbane QLD 4000
Tel: (07) 3004 8888
Fax: (07) 3004 8899
Ref: SCR:MKR:20180413

property of the FMIF to the First Applicant.

3. The Applicants' costs of the Application up to and including 20 February 2020, as agreed by the First Respondent or as assessed, on the indemnity basis, shall be paid from the property of the FMIF to the First Applicant.
4. The Applicants' costs of the Application after 20 February 2020, as agreed by the First Respondent or as assessed, on the standard basis, shall be paid from the property of the FMIF to the First Applicant.

Signed:


Deputy Registrar



Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 14389/2022

First Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
ACN 077 208 461**

AND

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

AND

Third Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM
INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN
INCOME FUND**

AND

Fourth Plaintiff: **LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)
ACN 077 208 461 AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND**

AND

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

ORDER

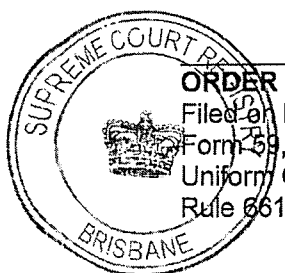
Before: Kelly J

Date: 19 February 2024

Initiating document: Amended Originating Application filed 18 November 2022 /
Counterclaim filed 7 September 2023

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. An order under section 601NF(2) of the *Corporations Act* 2001 (Cth) that the Defendant is empowered to cause the Second Plaintiff to comply with the terms of the Deed of Settlement dated 11 November 2022 (as that term is used in the Defendant's Counterclaim filed 7 September 2023).



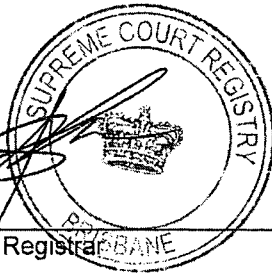
ORDER
Filed on behalf of the Plaintiffs
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 661

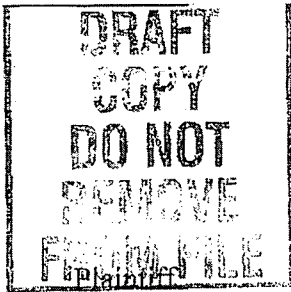
Cowen Schwarz Marschke Lawyers
Level 8, 300 George Street
Brisbane, Qld, 4000
Tel: (07) 300 300 00
Fax: (07) 300 300 33
Email: dschwarz@csmlawyers.com.au

2. This proceeding, including the Amended Originating Application filed 18 November 2022 (the **Originating Application**) and the Counterclaim of the Defendant filed 7 September 2023, be dismissed.
3. The Defendant's costs of the proceeding, including the Originating Application and the Counterclaim filed 7 September 2023, and of the application filed 13 April 2023, be costs in the winding up of the LM First Mortgage Income Fund ARSN 089 343 288 ("**the Fund**") and paid from the assets of the Fund on an indemnity basis.
4. The Plaintiffs' costs of the proceeding, including the Originating Application and the Counterclaim filed 7 September 2023, be:
 - (a) fixed in the sum of \$369,708 in respect of the period up to 15 February 2024 and paid from the assets of the Fund; and
 - (b) otherwise, in respect of further work to be done up to 19 February 2024, paid from the assets of the Fund on an indemnity basis.
5. Within 14 days of the date of this order, the defendant shall arrange for the costs payable under paragraph 4(a) of these orders to be paid by the second plaintiff from the Fund to the plaintiffs.
6. The subpoenas addressed to Mr David Whyte in his own right and as the Court appointed receiver of the Second Plaintiff be discharged.

Signed: _____

Deputy Registrar





SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 2166/15

LM INVESTMENT MANAGEMENT LIMITED
(IN LIQUIDATION) IN ITS CAPACITY AS
RESPONSIBLE ENTITY FOR THE LM FIRST
MORTGAGE INCOME FUND (RECEIVERS
AND MANAGERS APPOINTED) (RECEIVER
APPOINTED) ARSN 089 343 288

AND

First Defendant:

EY (ALSO KNOWN AS ERNST & YOUNG)
(A FIRM)

AND

Second Defendant:

PAULA MCLUSKIE

AND

Third Defendant

MICHAEL JAMES REID

ORDER

Before: Justice Dalton

Date: 11 August 2022

BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. Order 3 of the orders made on 11 December 2020 is vacated.
2. The Plaintiff has leave to discontinue its claims against the Defendants.
3. The Defendants have leave to discontinue their claims against the Plaintiff.
4. The Plaintiff and the Defendants each bear their own costs of this proceeding, including the Defendants' counterclaim filed 3 March 2020.

Signed: _____

Order
Form 59
Rule 661
Filed on Behalf of the Plaintiff

Gadens Lawyers
Level 11, 111 Eagle Street
BRISBANE, QLD, 4000
Phone: 07 3231 1666
Fax: 07 3229 5850
SZC/TZH 201413563 **307**

SUPREME COURT
OF QUEENSLAND

19 JUN 2018

FILED
BRISBANE

SUPREME COURT OF QUEENSLAND

26
REGISTRY: BRISBANE
NUMBER: 13534/16

Plaintiff:

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

AND

First Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS
AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN
077 208 461 AS RESPONSIBLE ENTITY OF THE LM
CURRENCY PROTECTED AUSTRALIAN INCOME FUND
ARSN 110 247 875 (RECEIVER APPOINTED)

AND

Second Defendant:

TRILOGY FUNDS MANAGEMENT LIMITED ACN 080 383
679 AS RESPONSIBLE ENTITY OF THE LM WHOLESALE
FIRST MORTGAGE INCOME FUND ARSN 099 857 511

AND

Third Defendant:

LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS
AND MANAGERS APPOINTED) (IN LIQUIDATION) ACN
077 208 461 AS RESPONSIBLE ENTITY OF THE LM
INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN
INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED)

AND

Fourth Defendant:

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

AND

Fifth Defendant:

THE TRUST COMPANY LIMITED ACN 004 027 749 AS
CUSTODIAN OF THE PROPERTY OF THE LM
WHOLESALE FIRST MORTGAGE INCOME FUND ARSN
099 857 511

ORDER

Before: Justice Jackson
Date: 13 June 2018
Initiating document: Amended Application filed 18 May 2018 and Commercial List
Application filed by email dated 24 April 2018

ORDER
Filed on behalf of the Plaintiff
Form 59, Version 1
Uniform Civil Procedure Rules 1999
Rule 66.1

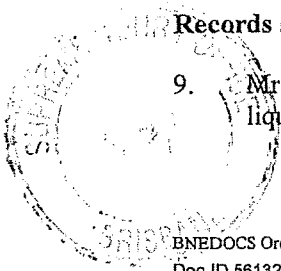
GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
JSO/SZC:201619858

THE ORDER OF THE COURT IS THAT:

1. The proceeding be placed on the Commercial List.
2. Pursuant to section 500(2) of the *Corporations Act* 2001 (Cth), the plaintiff has leave *nunc pro tunc* to commence and proceed with Supreme Court Proceeding numbered 13534 of 2016 against the first defendant, the third defendant and the fourth defendant, being LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM) in its capacity as responsible entity of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (CPAIF), as responsible entity of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 (ICPAIF) and in its own right.
3. Pursuant to section 59 of the *Trusts Act* 1973 (Qld), directions that:
 - a. the interests of LMIM in its capacity as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF) as plaintiff have been and continue to be represented in these proceedings by Mr David Whyte, in his capacity as the court appointed receiver of the property of the FMIF and as the person appointed to be responsible for ensuring that the FMIF is wound up pursuant to its constitution by the order of Dalton J made in proceedings numbered 3383/2013 on 21 August 2013;
 - b. the interests of LMIM in its capacity as responsible entity of the CPAIF as first defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the CPAIF;
 - c. the interests of LMIM in its capacity as responsible entity of the ICPAIF as third defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the ICPAIF;
 - d. the interests of LMIM in its own capacity as fourth defendant be represented in these proceedings by the liquidator of LMIM, Mr John Park.
4. The Trust Company Limited ACN 004 027 749 as custodian of the property of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (WFMIF) is joined to the proceeding, as the fifth defendant.
5. The Plaintiff has leave to file and serve the Further Amended Claim, in the form exhibited to the affidavit of Jamie O'Regan sworn 28 May 2018, the amendments to take effect from the date of this order.
6. The Amended Application filed 18 May 2018 is otherwise dismissed.
7. The parties' costs of the Application filed 30 October 2017 and of the Amended Application filed 18 May 2018 are each party's costs in the proceeding.
8. The parties' costs of the plaintiff's Commercial List Application are each party's costs in the proceeding.

Records and documents relating to the CPAIF and the ICPAIF

9. Mr John Park, as the representative of the Fourth Defendant in these proceedings and the liquidator of LMIM, provide to Mr Said Jahani, as the representative of the First and Third



Defendants, and to Mr David Whyte, as the representative of the Plaintiff, the following documents and records by Friday, 22 June 2018:

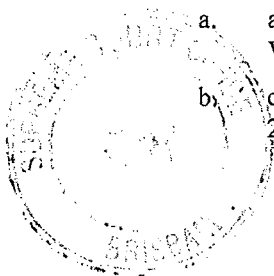
- a. a complete and up to date copy of the registers of members maintained for the CPAIF, including all contact and other details for every current member recorded therein;
 - b. a complete and up to date copy of the registers of members maintained for the ICPAIF, including all contact and other details for every current member recorded therein,
- and the Plaintiff will pay Mr Park's reasonable costs of providing the documents and records referred to above.

10. The Plaintiff will provide to Mr Said Jahani, as the representative of the First and Third Defendants, the following further documents and records by Friday, 29 June 2018:

- a. a statement listing all transactions on the register of members maintained for the CPAIF between 11 May 2009 and 31 January 2013, including any redemptions;
- b. copies of all available bank account statements of the CPAIF for the period 11 May 2009 to 31 January 2013;
- c. copies of the ledger or ledgers of the CPAIF recording the payment of any redemptions to the members of the CPAIF for the period 11 May 2009 to 31 January 2013;
- d. copies of the ledger or ledgers of the CPAIF recording the accounting treatment of redemptions from the FMIF to the CPAIF for the period 11 May 2009 to 31 January 2013;
- e. copies of any audited accounts of the CPAIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013;
- f. a statement listing all transactions on the register of members maintained for the ICPAIF between 11 May 2009 and 31 January 2013, including any redemptions;
- g. copies of all available bank account statements of the ICPAIF for the period 11 May 2009 to 31 January 2013;
- h. copies of the ledger or ledgers of the ICPAIF recording the payment of any redemptions to the members of the ICPAIF for the period 11 May 2009 to 31 January 2013;
- i. copies of the ledger or ledgers of the ICPAIF recording the accounting treatment of redemptions from the FMIF to the ICPAIF for the period 11 May 2009 to 31 January 2013; and
- j. copies of any audited accounts of the ICPAIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013.

11. The Plaintiff will provide to the Second Defendant the following further documents and records by Friday, 29 June 2018:

- a. a statement listing all transactions on the register of members maintained for the WFMIIF between 11 May 2009 and 31 January 2013, including any redemptions;
- b. copies of all available bank account statements of the WFMIIF for the period 11 May 2009 to 31 January 2013;



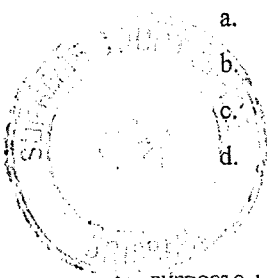
- c. copies of the ledger or ledgers of the WFMIF recording the payment of any redemptions to the members of the WFMIF for the period 11 May 2009 to 31 January 2013;
- d. copies of the ledger or ledgers of the WFMIF recording the accounting treatment of redemptions from the FMIF to the WFMIF for the period 11 May 2009 to 31 January 2013;
- e. copies of any audited accounts of the WFMIF relating to the period 11 May 2009 to 31 January 2013 and the last available management accounts for the financial year ended 30 June 2013.

Notification of the members of the CPAIF and the ICPAIF

- 12. The Plaintiff is to give notice to the members of the CPAIF and ICPAIF of this proceeding, the ordered mediation, the Further Amended Claim, the Second Further Amended Statement of Claim and this order, by the Plaintiff:-
 - a. causing, on or before Monday, 25 June 2018, each of the documents mentioned above and a copy of the notice in the form of Annexure A to this order (“the Notice”) to be posted in a prominent place on the website www.lmfmif.com; and
 - b. sending, on or before 29 June 2018, a copy of the Notice to all members of the CPAIF and the ICPAIF by each member’s preferred method of receipt or distribution of notices as recorded in the CPAIF and the ICPAIF register of members.
- 13. Mr John Park, as the representative of the Fourth Defendant in these proceedings and the liquidator of LMIM, give notice to the members of the CPAIF and the ICPAIF of this proceeding by causing, on or before 25 June 2018, the Notice and a link to the place on the website referred to in paragraph 12(a) above (to be advised by Mr Whyte on or before Monday, 25 June 2018) to be posted in a prominent place on the website www.lminvestmentadministration.com/cpaif_icpaif, and the Plaintiff will pay Mr Park’s reasonable costs of giving notice in accordance with this paragraph.
- 14. Notice will be deemed to have been given to the members of the CPAIF and the ICPAIF of the documents mentioned in paragraph 12 above, ten days after the posting of those documents to the website in accordance with paragraph 12 above.
- 15. Notice is to be given to members of the CPAIF and the ICPAIF of further documents filed in these proceedings by the Plaintiff causing such documents to be posted to the website www.lmfmif.com.

Mediation

- 16. The parties, except for the fourth and fifth defendants, are directed to attend, participate in, and act reasonably and genuinely in, a mediation on a date to be agreed by the participating parties and the mediator, to be completed by 28 September 2018.
- 17. The mediator is to be selected by the parties by Friday, 22 June 2018.
- 18. Copies of the following documents are to be provided to the mediator:
 - a. The most recent originating process and pleadings filed by the plaintiff;
 - b. The affidavits of David Whyte sworn 31 October 2017 and 21 May 2018;
 - c. The affidavit of Jamie O’Regan sworn 28 May 2018;
 - d. The affidavit of Said Jahani sworn 24 November 2017;

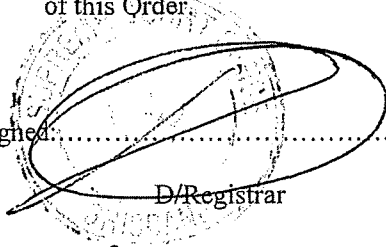


- e. The position papers prepared by the parties, to be provided as follows:
 - i. The Plaintiff, on or before 21 days before the commencement of the mediation;
 - ii. The first, second and third defendants, on or before 7 days before the commencement of the mediation.
 - f. Any further document that any party to the mediation desires to provide to the mediator.
19. The period of the mediation is fixed at a maximum of two days and may extend beyond the period only with the authorisation of the parties.
20. The parties are to negotiate a fee with the mediator.
21. The parties are to pay the following percentages of costs of the mediator:
 - a. The Plaintiff – 50%
 - b. The First Defendant– 16.6%
 - c. The Third Defendant– 16.6%
 - d. The Second Defendant – 16.6%
22. The parties must pay their respective percentages of the fee negotiated by the parties with the mediator to the mediator in accordance with the mediator’s terms.
23. The mediator is to be informed of the appointment by the plaintiff.
24. The parties each have liberty to apply.

AND THE FURTHER ORDER OF THE COURT, NOTING THE CONSENT OF MR DAVID CLOUT, LIQUIDATOR OF LM ADMINISTRATION PTY LTD (IN LIQUIDATION) AND MR JARROD VILLANI, OF KORDA MENTHA PTY LTD IN ITS CAPACITY AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND, IS THAT:

25. For the purposes of the undertaking provided by David Whyte in the Supreme Court Proceedings No. 3383 of 2013 and the undertaking of any servant or agent of BDO signed in accordance with paragraph 3 of the undertaking of Mr Whyte, the Court hereby approves the interrogation, use and disclosure, solely for the purposes of this proceeding, of any Non-Fund information about or concerning the affairs of the CPAIF, the ICPAIF and the WFMIF (save for any privileged Non-Fund information) stored on the server provided to the Plaintiff so as to enable the Plaintiff to provide the information and documents to Mr Said Jahani pursuant to paragraph 10 of this Order and to the Second Defendant pursuant to paragraph 11 of this Order.

Signed:



D/Registrar

Annexure A - Form of Notice

TO THE MEMBERS OF THE LM CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 110 247 875 (RECEIVER APPOINTED) (“CPAIF”) AND THE MEMEBERS OF THE LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND ARSN 122 052 868 (RECEIVER APPOINTED) (“ICPAIF”)

TAKE NOTICE that David Whyte, the person appointed pursuant to section 601NF(1) of the *Corporations Act* 2001 (Cth) to take responsibility for ensuring that THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (Receivers and Managers Appointed) (Receiver Appointed) (“FMIF”) is wound up in accordance with its constitution, has applied to the Supreme Court of Queensland including for declarations that:

- (a) would, depending on the amount ultimately available for distribution in the winding up of the FMIF, have the effect of reducing or eliminating any distribution to be paid to the CPAIF and the ICPAIF, to the extent of the value of redemptions that were allowed in favour of the Class B unitholders between 11 May 2009 and 31 January 2013 without power and in breach of trust, as adjusted for any overpayment or underpayment of capital distributions made in February and June 2013;
- (b) would adjust the number of units held by the CPAIF and the ICPAIF in the FMIF to reinstate those units, but also to cancel further units in the FMIF issued to the CPAIF and the ICPAIF between 1 July 2011 and 1 November 2012 without power and in breach of trust.

Following the hearing of an application in the above proceedings on 29 May 2018, certain orders were made including that, pursuant to section 59 of the *Trusts Act 1973 (Qld)*, the interests of LMIM in its capacity as responsible entity of the CPAIF as first defendant and of LMIM in its capacity as responsible entity of the ICPAIF as third defendant be represented in these proceedings by Mr Said Jahani of Grant Thornton in his capacity as receiver and manager of the property of the CPAIF and of the ICPAIF.

In addition, orders were made for the parties to the proceedings to engage in a mediation on a date to be agreed to be completed by 28 September 2018.

Copies of the Further Amended Claim and the Second Further Amended Statement of Claim and the Orders dated 13 June 2018 in respect of this proceeding are available on the website www.lmfimf.com and the website www.lminvestmentadministration.com.

Any member has a right to apply to the Court if they wish to be heard in the proceeding or to be represented in the mediation.

Any member who wishes to know more about the proceedings and the proposed mediation in the proceedings, including if the member wishes to request any material relating to the mediation, should contact the solicitors for the receiver of the CPAIF and the ICPAIF, Messrs. David O'Farrell of HWL Ebsworth, on +61 7 3169 4844.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11560/16

Amended pursuant to the Order of the Registrar dated

Dated: 30.6.2017 Signed: [Signature]

Tucker & Cowen

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

AND

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

AMENDED CLAIM

The plaintiff claims:

1. A declaration that by:
 - (a) causing amounts to be paid in anticipation of the RE Management Fee (as defined in paragraph 10(d) 13(f) of the Statement of Claim) to be paid at its direction, from the assets property of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), in advance of performing or causing to be performed the duties and obligations in respect of which the RE Management Fee was to be payable, from the assets of the FMIF;
 - (b) causing further amounts to be paid at its direction, from the assets of the FMIF, in anticipation of LMIM becoming liable to LM Administration Pty Ltd ACN 055 691 426 ("LMA") for Service Fees in relation to the FMIF additional to the RE Management Fee;

AMENDED CLAIM
Form 2, Version 2, Rule 22

Filed on behalf of the Plaintiff

TUCKER & COWEN

Solicitors

Level 15

15 Adelaide Street

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(c) further and in the alternative, causing the Service Fees and the Resources Fees (as defined in paragraphs ~~1826~~(b), ~~27~~(c) and ~~2842~~ of the Statement of Claim) to be prepaid to LMA, from the assets of the FMIF, in circumstances where there was already a debit balance in the LMA Account (as defined in paragraph 42 of the Statement of Claim).

the Defendant ("LMIM") acted in breach of its trust of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), and in contravention of section 601FC(1) of the *Corporations Act 2001* ("Act").

2. A declaration that, by failing to cause updated independent valuations to be obtained of the real property security assets securing a significant number of the loans made on behalf of the FMIF, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
3. A declaration that, by causing the Loan Management Fees (as defined in paragraphs ~~54~~ and ~~57~~ paragraph ~~65~~ of the Statement of Claim) to be paid to LMA from the assets of the FMIF in the financial years ended 30 June 2011, 30 June 2012 and 30 June 2013, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
4. A declaration that, by causing the Feeder Fund Payments (as defined in paragraphs ~~70~~ and ~~71~~ ~~41(a)(ii)~~, ~~105~~ and ~~106~~ above) to be made, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
5. A declaration that, by reason of LMIM's breaches of trust and contraventions of the Act referred to in paragraphs 1 to 4 hereof, LMIM caused loss to the FMIF, in an amount to be assessed by this Honourable Court.
6. A declaration that LMIM's right to be indemnified from the assets of the FMIF is limited to the balance between what LMIM would otherwise be entitled by way of indemnity, and the extent of LMIM's obligation to reconstitute the FMIF for the losses caused to the FMIF by its breaches of trust or, further and in the alternative, its contraventions of the Act.
7. ~~Against~~ Further and in the alternative, against the Defendant:
 - (a) equitable compensation; and
 - (b) compensation pursuant to section 1317H(1) of the Act,

to be paid including by reference to LMIM's right to be indemnified from the assets of the FMIF, as set out in paragraph 6, but only to the extent of that right.
8. Such further or other orders as may to the Court seem meet, including orders for the adjustment of the account between LMIM and the FMIF to properly account for the liability of LMIM to reconstitute the FMIF.
9. Interest pursuant to s 58 of the *Civil Proceedings Act 2011* (Qld) at such rate and for such period as this Honourable Court deems fit.
10. Costs.



The plaintiff makes this claim in reliance on the facts alleged in the attached Statement of Claim.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on ~~9 November 2016~~

~~June 2017~~

9 November 2016

D/ Registrar:



To the defendant:

TAKE NOTICE that you are being sued by the plaintiff in the Court. If you intend to dispute this claim or wish to raise any counterclaim against the plaintiff, you must within 28 days of the service upon you of this claim file a Notice of Intention to Defend in this Registry. If you do not comply with this requirement judgment may be given against you for the relief claimed and costs without further notice to you. The Notice should be in Form 6 to the Uniform Civil Procedure Rules. You must serve a sealed copy of it at the plaintiff's address for service shown in this claim as soon as possible.

Address of Registry: 415 George Street, Brisbane, Qld 4000

If you assert that this Court does not have jurisdiction in this matter or assert any irregularity you must file a Conditional Notice of Intention to Defend in Form 7 under Rule 144, and apply for an order under Rule 16 within 14 days of filing that Notice.

PARTICULARS OF THE PLAINTIFF:

Name:	LM Investment Management Limited (Receivers and Managers Appointed) (in liquidation) (ACN 077 208 461) as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288
Plaintiff's residential or business address:	C/- BDO, Level 10, 12 Creek Street, Brisbane Qld 4000
Plaintiff's solicitors name: and firm name:	David Schwarz Tucker & Cowen, Solicitors
Solicitor's business address:	Level 15, 15 Adelaide Street, Brisbane Qld 4000
Address for service:	Level 15, 15 Adelaide Street, Brisbane Qld 4000
Telephone:	(07) 300 300 00
Fax:	(07) 300 300 33
E-mail address:	dschwarz@tuckercowen.com.au



Signed:

Description: Solicitors for the Plaintiff
Tucker & Cowen

Dated: 30 November 2016 June 2017

This Amended Claim is to be served

on: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) (ACN 077 208 461)
of: C/- FTI Consulting 'Corporate Centre One'
Level 9
2 Corporate Court
Bundall Qld 4217



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 11560/16

Amended pursuant to Rule 378 of the Uniform Civil Procedure Rules 1999

Date: 30.6.2017 Signed: [Signature]

Tucker & Cowen

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

AND

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

Filed in the Brisbane registry on: 9 November 2016 30 June 2017

AMENDED STATEMENT OF CLAIM

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

Parties

I INTRODUCTION

LMIM and FMIF

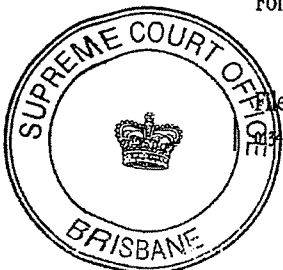
1. The Defendant ("LMIM"):-
 - (a) is and was at all material times a company duly incorporated according to law;

AMENDED STATEMENT OF CLAIM
Form 16 rr.22; 146

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

Filed on behalf of the Plaintiff

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- (b) is and was at all material times the responsible entity ("RE") of the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) ("FMIF"), a registered managed investment scheme under the *Corporations Act 2001* ("the Act");
 - (c) operated the FMIF by causing funds from the FMIF to be advanced to borrowers ("Borrowers") upon securities ("Securities") over properties ("Secured Properties");
 - ~~(e)~~(d) was placed into voluntary administration on 19 March 2013, at which time John Richard Park ("Mr Park") and Ginette Dawn Muller ("Ms Muller") were appointed as its administrators; and
 - ~~(d)~~(e) was placed into liquidation on 1 August 2013, at which time Mr Park and Ms Muller were appointed as its liquidators.
2. Pursuant to Orders of Dalton J dated 21 August 2013 ("the Orders"), LMIM was directed to wind up the FMIF, subject to, *inter alia*, the appointment of Mr David Whyte referred in paragraphs 3 (a) and (b) herein.
 3. Pursuant to the Orders, Mr David Whyte:-
 - (a) was appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
 - (b) was appointed pursuant to s 601NF(2) as receiver of the property of the FMIF;
 - (c) has, in relation to the property of the FMIF, the powers set out in s 420 of the Act;
 - (d) is authorised to bring, defend or maintain any proceedings on behalf of FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its Constitution; and
 - (e) is entitled to bring and brings these proceedings in the name of LMIM as responsible entity of the FMIF.

LMIM – Other Roles

4. At all material times until 12 April 2013, LMIM was also the trustee of the LM Managed Performance Fund ("MPF").
5. The trustee or trustees of the ~~LM Managed Performance Fund ("MPF")~~ were, from time to time:-
 - (a) until 12 April 2013, LMIM;
 - (b) from 12 April 2013 until 5 January 2015, KordaMentha Pty Ltd ACN 100 169 391 ("KordaMentha") and Calibre Capital Limited ACN 108 318 985; and
 - (c) from 5 January 2015, KordaMentha.

6. LMIM:-
- (a) was at all material times until 16 November 2012, the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("WFMIIF");
 - (b) is and was at all material times, the RE of the LM Currency Protected Australian Income Fund ARSN 110 247 875 ("CPAIF"); and the
 - (c) is and was at all material times, the RE of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("ICPAIF"),
- together, known as the "Feeder Funds", each of which was a registered managed investment scheme under the Act.

7. The property of each of the Feeder Funds predominantly comprised units in the FMIF.

Management of the FMIF by LMIM

LMA

8. LM Administration Pty Ltd ACN 055 691 426 ("LMA"):
- (a) is and was at all material times a company duly incorporated according to law;
 - (b) at all material times conducted its operations as the trustee of various trusts, including the LM Administration Trust;
 - (c) was placed into voluntary administration on 19 March 2013, at which time Mr Park and Ms Muller were appointed as its administrators;
 - (d) was placed into liquidation on 26 July 2013, at which time Mr David Clout and Ms Lorraine Smith were appointed as its liquidators.
9. At all material times, LMA:
- (a) had no business other than in relation to the managed investment schemes and trusts managed by LMIM as responsible entity and trustee, or trustee, as the case may be;
 - (b) shared the same place of business as LMIM;
 - (c) had as its sole director Mr Peter Drake, who was also:
 - (i) the Executive Director and Chief Executive Officer of LMIM; and
 - (ii) a beneficiary of the various trusts pursuant to which LMA carried out its operations, including the LM Administration Trust;
 - (d) had as its sole shareholder Mr Peter Drake, who was also the sole ultimate owner of LMIM;

(e) employed and paid the salaries of each of the directors of LMIM.

10. In the premises of paragraphs 8(c) and 9 above, and paragraphs 26 and 27 below, at all material times until 26 July 2013 LMA was an entity which was controlled, related or otherwise not independent of LMIM.

The Trust

8-11. At all material times, pursuant to section 601FC(2) of the Act, LMIM held the property of the FMIF on trust for its members: ("the Trust").

Particulars:

(a) LMIM held assets as trustee for the members of the FMIF;

(b) LMIM, by its agent, held assets as trustee for the members of the FMIF;

(c) LMIM held rights and interests in the property of the FMIF as trustee for the members of the FMIF.

9-12. The material rights and obligations of LMIM as trustee of the Trust terms of the trust on which LMIM held the assets of the FMIF were those contained in, inter alia:

(a) the Product Disclosure Statement for the FMIF as it was from time to time;

(b)(a) the successive deeds containing the Constitution of the FMIF and the terms of the Trust ("the Constitution");

Particulars.

The deeds were relevantly as follows:

(i) For the period 31 May 2007 to 10 April 2008, the Replacement Constitution of the FMIF executed by LMIM as a deed and dated 31 May 2007; and

(ii) At all material times from 10 April 2008, the Replacement Constitution of the FMIF executed by LMIM as a deed and dated 10 April 2008, and as amended from time to time.

(e)(b) the Corporations Act to the extent to which it applied the obligations of a Responsible Entity of a managed investment fund.

~~10.13.~~ At all material times, and pursuant to section 601FB(1) of the Act, the FMIF was governed by the Constitution, which relevantly provided to the following effect:-

- (a) by clause 1.1:-
 - (i) the "Custodian" means Permanent Trustee Australia Limited ACN 008 412 913, which company is now known as "The Trust Company (PTAL) Limited" ("PTAL");
 - ~~(ii)~~ (ii) the "Responsible Entity", or "RE" means the company named in ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE who is also the Trustee of the Scheme;
 - ~~(iii)~~ (iii) the "Scheme" means the FMIF;
 - ~~(iv)~~ (iv) the "Scheme Property" means assets of the Scheme;
- (b) by clauses 2.1 and 2.2, the RE is trustee of the Scheme and holds the property of the Scheme on trust for members of the Scheme;
- (c) by clause 2.3, the RE has appointed The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) ("PTAL") the Custodian as agent to hold the Scheme Property on behalf of the RE, on the terms and conditions as detailed in the Custody Agreement;
- (d) by clause 13.4, where a loan of Scheme funds involves a Development Loan, the RE shall ensure that it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind
- (e) by clause 13.7, the RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution;
- ~~(f)~~ (f) by clause 18.3, the RE is entitled to receive out of Scheme Property a management fee ("RE Management Fee") of up to 5.5% per annum (inclusive of GST) of the value of the Scheme Property less the Liabilities at that time ("Net Fund Value") in relation to the performance of its duties as detailed in the Constitution, the Compliance Plan and the Law ("RE Management Fee"). The fee was to be calculated monthly and paid at such times as the RE determines.
- ~~(g)~~ (g) by clause 17, the RE may cause the Scheme Property to be valued at any time, and may determine the Net Fund Value at any time in its discretion;
- ~~(h)~~ (h) by clause 18.4, the duties for which the RE shall be entitled to receive the RE Management Fee include the following duties:-
 - (i) (sub-clause e) loan management;
 - (ii) (sub-clause h) the sale of real estate or assets of the Scheme Property;

- ~~(iii)~~ (sub-clause j) the appointment of the Custodian pursuant to the Custodian Agreement;
- ~~(iii)~~(iv) (sub-clause k) the winding-up of the Scheme; and
- ~~(iv)~~(v) (sub-clause l) the performance of its duties and obligations pursuant to the Act and this Constitution;
- ~~(g)~~(i) by clause 18.5, the RE shall be indemnified out of the Scheme Property for liabilities or expenses incurred in relation to the performance of its duties, including:-
 - (i) (sub-clause v) reasonable costs incurred in protecting or preserving all assets offered as security;
 - (ii) (sub-clause w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed by the RE or by an agent appointed pursuant to s601FB(2) of the [Act];
 - (iii) (sub-clause y) fees and expenses of any agent or delegate appointed by the RE;
- ~~(h)~~ by clause 18.7, ~~any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment;~~
- ~~(j)~~(i) by clause 18.8, the RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with the Constitution; ~~and~~
- ~~(j)~~(k) by clause 18.9, the RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under clause 18 of the Constitution;

Particulars.

- ~~(i)~~ At all material times from 10 April 2008, the above terms were contained in the Replacement Constitution of the FMIF dated 10 April 2008 as amended from time to time;
- ~~(ii)~~ For the period 31 May 2007 to 10 April 2008, terms to the effect of the above were contained in Replacement Constitution of the FMIF dated 31 May 2007;
- ~~(iii)~~ Further particulars will be provided.
- (l) by clause 21.1, the Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.

14. At all material times, LMIM as RE of the FMIF waived part of its right to the RE Management Fee.

Particulars.

The best particulars which the Plaintiff is currently able to provide is that the waiver can be inferred from:

- (a) The Product Disclosure Statement of the FMIF dated 10 April 2008, issued by LMIM to investors and potential investors in the FMIF, on page 23 stated that "it is estimated that the Manager will only receive a Management Fee of 2.3% pa of the net assets of the Fund, and that the Manager will waive its entitlement to the higher fee. Note however the section "Changes to Fees and Costs" on this page of this PDS."
- (b) The Directors' Report to the 30 June 2012 Financial Statements states that "The Responsible Entity will be returning to its low historic fee levels, capping the management fee at 1.5% pa, as of 1 November 2012".

~~11. At all material times until 1 November 2012, LMIM as RE of the FMIF capped the RE Management Fee at 2.3% per annum of the Net Fund Value.~~

Particulars.

- ~~(a) The Product Disclosure Statement of the FMIF dated 10 April 2008, issued by LMIM to investors and potential investors in the FMIF, on page 23 stated that "it is estimated that the Manager will only receive a Management Fee of 2.3% pa of the net assets of the Fund, and that the Manager will waive its entitlement to the higher fee. Note however the section "Changes to Fees and Costs" on this page of this PDS."~~

~~12. As of 1 November 2012, LMIM as RE of the FMIF capped the RE Management Fee at 1.5% per annum.~~

Particulars.

- ~~(a) The Directors' Report to the 30 June 2012 Financial Statements states that "The Responsible Entity will be returning to its low historic fee levels, capping the management fee at 1.5% pa, as of 1 November 2012".~~

~~13.~~ 15. Pursuant to section 601GA(2)(b) of the Act, the RE's and upon that section's true construction, LMIM's rights to payment of the RE Management Fee, or to be indemnified out of the property of the FMIF for liabilities or expenses incurred in relation to the performance of its duties, are:

- (a) available only in relation to the fulfilment of its duties which have been properly performed; and
- (b) thus not available in relation to duties which the RE has not yet performed.

14. The Product Disclosure Statement of the FMIF dated 10 April 2008 ("PDS") provided that the RE Management Fee "accrues daily and is paid monthly from the assets of the [FMIF]".
15. In the premises it was a term of the trust on which LMIM held the assets of the FMIF that it would only be entitled to the payment of the RE Management Fee subsequent to the performance of the work to which the fees related.
16. Pursuant to section 601GA(2) of the Act, any agreement or arrangement, including in the Constitution, which purports to make available to LMIM a right to payment of the RE Management Fee, or to be indemnified out of the property of the FMIF, other than in relation to the proper performance of duties already performed has no effect to that extent.
17. Pursuant to s.601GA(2)(a) of the Act, and upon that section's true construction, LMIM has no right to be paid any fee out of the property of the FMIF unless the following are specified in the Constitution:
 - (a) the performance to which the fee relates; and
 - (b) the way in which the fee is to be calculated.
18. Further, the reference to "fees" in s.601GA(2) of the Act, upon that section's true construction, includes any claim by the RE either for remuneration for services provided by the RE, or for the recovery of remuneration payable by the RE to an entity which was controlled, related or otherwise not independent of LMIM.
19. Pursuant to section 601GA(2) of the Act, any agreement or arrangement, including in the Constitution, which purports to make available to LMIM a right to payment of a fee out of the property of the FMIF which does not have the said matters specified in the Constitution has no effect to that extent.
20. Upon the true construction of the Constitution, LMIM had no entitlement to be paid out of the property of the FMIF (save to the extent of the RE Management Fee) for the cost of engaging other persons to perform the duties of LMIM as detailed in clause 18.4 of the Constitution.
21. Pursuant to section 601GA(2) of the Act, any agreement or arrangement which purports to make available to LMIM a right to be indemnified out of the property of the FMIF for the cost of engaging other persons to perform the said duties has no effect to that extent, unless the following is specified in the Constitution:
 - (a) the duties which LMIM is entitled to be indemnified for the costs of engaging such other persons to perform; and

(b) the way in which the amount to be paid to such other persons is to be calculated.

22. Further and in the alternative, pursuant to section 601GA(2) of the Act, any agreement or arrangement which purports to make available to LMIM a right to be indemnified out of the property of the FMIF for the cost of engaging any entity which was controlled, related or otherwise not independent of LMIM has no effect to that extent, unless the following is specified in the Constitution:

(a) the performance to which the cost relates;

(b) the way in which the cost is to be calculated.

The Custody Agreement

~~16.~~^{23.} PTAL was at all material times the custodian of the property of the FMIF and the agent of LMIM, pursuant to the terms of a Custody Agreement between PTAL and LMIM dated 4 February 1999 (as amended from time to time) ("Custody Agreement").

~~17.~~^{24.} The Custody Agreement included material terms to the following effect:-

- (a) (Clause 2.1) LMIM appoints PTAL to provide custodial services on the terms of this agreement.
- (b) (Clause 2.2) PTAL accepts its appointment and agrees to provide custodial services to LMIM on the terms of the Custody Agreement.
- (c) (Clause 3.1 and Schedule 2) Subject to the provisions of this agreement, PTAL agrees to custodially hold the property of the FMIF Custodially Held (as defined in the Custody Agreement) from time to time ("Portfolio") and Title Documents as agent for LMIM in relation to each Scheme, including the FMIF.
- (d) (Clause 3.8) PTAL may appoint or engage at LMIM's expense accountants, auditors, barristers, solicitors, advisers, consultants, brokers, counterparties, couriers or other persons where it reasonably considers their appointment or engagement necessary for the purposes of exercising its powers or performing its duties under the Custody Agreement.
- (e) (Clause 4.1) LMIM is responsible for taking all decisions in relation to the Portfolio and properly communicating to PTAL Instructions in relation to the assets of the Portfolio. Subject to the Custody Agreement, PTAL must act on LMIM's Instructions in relation to any assets of the Portfolio.
- (f) (Clause 4.3) PTAL is not responsible for reviewing or advising LMIM on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by LMIM.

- (g) (Clause 4.8) PTAL is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties;
- (h) (Clause 8.2) PTAL is entitled to recover from LMIM the amount of all Taxes and bank charges, and all other liabilities, costs, charges and expenses which it suffers or incurs in connection with the performance of its duties and the exercise of its powers under the Custody Agreement.

25. In the premises, PTAL was a duly appointed agent of LMIM.

Administration Agreement Services Agreements with LMA-

18:26. At all material times until 21 March 2013, LMIM and LMA as trustee for the LM Administration Pty Ltd AGN 055 691 426 ("LMA") Trust were parties to a Service Agreement series of services agreements ("Services Agreements"), in the following material terms:-

- (a) LMA agreed to supply staff, equipment and all services necessary for the proper and efficient management and administration of LMIM's funds management business; and
- (b) LMIM agreed to pay service fees for LMA's services ("Service Fees"), which included recovery of a proportion of LMA's expenses, plus the entirety of the RE Management Fee charged to the FMIF;

("Services Agreements").

- (c) LMIM and LMA agreed that the Service Fees shall be calculated quarterly with the first of such quarterly payments being due and payable on the last day of the quarter.

Particulars.

Services Agreements dated 1 July 2003, 1 July 2009 and 1 July 2010, containing the pleaded material terms, or terms to that effect, were executed by LMIM and LMA respectively. Further particulars will be provided.

27. On or about 21 March 2013, following the appointment of administrators to both LMIM and LMA, LMIM and LMA entered into a further services agreement ("Resources Agreement"), in material terms to the following effect:

- (a) (clause 2.1) LMA agreed to supply Resources, meaning:

- (i) the Staff, being staff employed by or engaged as a consultant to LMA or its related bodies corporate who are provided as to all or part of their time to LMIM to perform the Functions under the Resources Agreement; and

(ii) the Other Resources, being premises, computer systems and other equipment, software, know-how and other tangible and intangible property owned, leased, licensed or otherwise procured by LMA or a related body corporate or associate of LMA and used by its staff to assist LMA to perform the Functions;

(b) The Functions mean:

(i) LMIM's corporate administration other than in connection with the FMIF;

(ii) all functions performed or services provided by LMIM in respect of administering or winding-up the Trusts or a Sub-Trust (or any of them) and caring for and preserving any property or assets of the FMIF;

(iii) all functions performed or services provided by LMIM in relation to self-custody of the assets of the FMIF;

(iv) any other functions in respect of which LMIM may require Resources from time to time and in respect of which LMA is willing and able to provide Resources, whether or not in connection with the FMIF;

(c) (clause 4.2) LMIM agreed to pay a Resources Fee ("Resources Fees"), being (in relation to the FMIF) either:

(i) subject to review by the Administrators, the management fee payable to LMIM under the Constitution for the relevant period less any amount of the management fee that LMIM reasonably considers should be withheld to pay, or provide for, other actual or contingent liabilities it has incurred or will incur in its personal capacity; or

(ii) any other fixed or variable fee agreed by the parties from time to time;

(d) (clauses 4.1 and 4.3) LMIM will calculate the Resources Fee within 5 Business Days of the last Business Day of every calendar month (or such other period as may be agreed by the parties), will notify LMA of the Resources Fee within one Business Day thereafter or as the parties determine, and will pay the Resources Fee within two Business Days of being notified or as the parties determine.

LMIM's outstanding financial obligations under certain facility agreements.

~~19. At the following material times, LMIM as RE of the FMIF was indebted to its financiers from time to time on terms which provided for payment of the following rates of interest:-~~

~~(a) until 30 June 2010 to the Commonwealth Bank of Australia, at a variable rate;~~

Particulars

~~(i) Further particulars of the variable rate from time to time to be provided.~~

~~(b) from 1 July 2010 to 30 November 2010, and from 1 January 2011 to 1 February 2011 to Deutsche Bank AG, 15 per cent per annum;~~

~~(c) in December 2010 and from 1 February 2011 to 3 May 2011 to Deutsche Bank AG, 18 per cent per annum;~~

~~(d) from 4 May 2011 to 30 June 2013, to Deutsche Bank AG, at least 15 per cent per annum;~~

~~(e) —~~

Circumstances of the FMIF

~~28. On 3 March 2009, LMIM declared that the FMIF would not accept applications from new investors, and requests by members to withdraw interests from the FMIF would be paid up to 365 days after maturity.~~

~~29. On about 11 May 2009, LMIM suspended withdrawal requests from members altogether, except in circumstances of hardship as defined by relief granted by ASIC under section 601QA(1) of the Act.~~

Particulars

~~(a) Relief was granted by ASIC pursuant to ASIC Instrument 09-00278 dated 14 April 2009, and later by ASIC Instrument 09-00963 dated 11 November 2009.~~

~~30. From and including the financial year ended 30 June 2009, a significant number of the loans made on behalf of the FMIF were in default for non-payment or were otherwise impaired.~~

~~31. In the premises, it is to be inferred that from and including the financial year ended 30 June 2009, LMIM was aware, or ought reasonably to have been aware, that there was a significant risk that the FMIF would not return a profit to its investors, and was therefore financially stricken.~~

LMIM's duties to members of the FMIF Duties

~~20-32.~~ At all material times, LMIM was subject to the following duties as trustee, when managing the affairs of the FMIF:-

- (a) to preserve the property of the FMIF;
- (b) to keep proper accounts of the FMIF;
- ~~(b)~~(c) to exercise the same care that:-
 - (i) a professional remunerated trustee would exercise in managing the affairs of an investment unit trust, namely a registered managed investment scheme, that is financially stricken;
 - (ii) further and in the alternative, an ordinary prudent person of business would exercise in managing similar affairs of his or her own;
- ~~(e)~~(d) to exercise its powers in good faith and in the best interest of members of the FMIF;
- ~~(d)~~(e) not to prefer its own interests where its interests may be in conflict with the interests of the members of the FMIF;
- ~~(e)~~(f) to adhere to the terms of the trust, comprising the Constitution, ("Equitable Duties").

~~21-33.~~ At all material times, LMIM was subject to the following further statutory duties under s 601FC(1) of the Act, ~~as responsible entity,~~ when exercising its powers and carrying out its duties as trustee of the Trust and as RE of the FMIF:-

- (a) to exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position;
- (b) to act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;
- (c) to ensure that all payments out of scheme property are made in accordance with the scheme's constitution and the Act, ("Statutory Duties").

34. Further, at all material times LMIM was required:

- (a) by s.601FC(1)(j) of the Act to ensure that the property of the FMIF was valued at regular intervals appropriate to the nature of the property;

- (b) by s.601FC(1)(h) of the Act to comply with the compliance plan of the FMIF and thereby:
- (i) to ensure that the Scheme Property is valued, as necessary, at intervals appropriate to the nature of the property;
 - (ii) to obtain an updated valuation, unless the RE considers that an updated valuation would serve no useful purpose, where a loan term is extended or a loan is otherwise varied; or
 - (iii) to obtain an updated valuation, unless the RE considers that an updated valuation would serve no useful purpose, for commercial loans at 24 month intervals and construction loans at 12 month intervals.

Particulars.

Parts 3 and 6(28) of the Compliance Plans applicable at material times, namely:

- (A) The Replacement Compliance Plan dated 28 November 2008;
- (B) The Replacement Compliance Plan dated 13 March 2009, as later modified by the Compliance Plan Modification dated 13 March 2009;
- (C) The Replacement Compliance Plan dated 16 March 2011.

Assignment of KPG Loans and the Lifestyle Loan from the FMIF to the MPF

22.35. On 28 August 2008, PTAL as custodian of the FMIF, LMIM as RE of the FMIF, and LMIM as trustee of the MPF, entered into a Deed of Assignment (the "KPG Loans Assignment").

23.36. Pursuant to the KPG Loans Assignment, PTAL as custodian of the FMIF, assigned its right, title and interest in two loans to KPG 13th Beach Stage 1 Pty Ltd (now named Barly Wood Pty Ltd) ACN 105 265 923, and the securities held by it in relation to those loans ("KPG Loans"), to LMIM as trustee of the MPF.

34.37. The terms of the KPG Loans Assignment, including as subsequently varied from time to time, included terms to the following effect:-

- (a) LMIM as trustee of the MPF agreed to pay to PTAL, as custodian of the FMIF, consideration comprising an amount to be determined by an independent valuation of the real property securities held in relation to the KPG Loans, plus interest from time to time ("KPG Consideration"); and
- (b) LMIM as trustee of the MPF agreed to pay the KPG Consideration by 28 August 2011.

~~25-38.~~ On 28 August 2008, PTAL as custodian of the FMIF, LMIM as RE of the FMIF, and LMIM as trustee of the MPF, entered into a further Deed of Assignment (the "Lifestyle Loan Assignment").

~~26-39.~~ Pursuant to the Lifestyle Loan Assignment, PTAL as Custodian of the FMIF, assigned its right, title and interest in a loan to Lifestyle Investment Company Pty Ltd ACN 095 392 215, and the securities held by it in relation to that loan ("Lifestyle Loan"), to LMIM as trustee of the MPF.

~~27-40.~~ The terms of the Lifestyle Loan Assignment, including as subsequently varied from time to time, included terms to the following effect:-

- (a) LMIM as trustee of the MPF agreed to pay to PTAL as custodian of the FMIF consideration comprising an amount to be determined by an independent valuation of the real property security held in relation to the Lifestyle Loan, plus interest from time to time ("Lifestyle Consideration"); and
- (b) LMIM as trustee of the MPF agreed to pay the Lifestyle Consideration by 28 August 2011.

41. Either:

- (a) LMIM as trustee of the MPF paid the KPG Consideration and the Lifestyle Consideration, and interest accruing thereon, by the end of the financial year ended 30 June 2011, relevantly by:
 - (i) making cash payments to LMA ("LMA MPF Payments"), which were recorded as a debit to the balance of the LMA Account (referred to in paragraph 42 below); and
 - (ii) making cash payments to itself as RE of a Feeder Fund, or to third parties for the benefit of a Feeder Fund, ("Feeder Fund Payments"), which were recorded in the FMIF accounts relating to the Feeder Funds; or
- (b) LMIM as trustee of the MPF did not relevantly pay the KPG Consideration and the Lifestyle Consideration.

II PRE-PAYMENT OF MANAGEMENT FEES

~~28-42.~~ From time to time from at least 1 July 2007 until 30 June 2013, LMIM caused to be paid at its direction, from the ~~assets~~ property of the FMIF, amounts:

- (a) in anticipation of the RE Management Fee, being amounts paid in advance of performing or causing to be performed the duties and obligations in respect of which that fee was to be payable to LMIM under the Constitution; and
- (b) other amounts in anticipation of LMIM becoming liable to LMA for Service Fees or other fees or expenses in relation to the FMIF additional to the RE Management Fee; and

~~(b)~~(c) further and in the alternative, usually in circumstances where there was already a debit balance in LMA's running account with LMIM.

Particulars.

The best particulars that the Plaintiff is presently able to provide are that:

(i) LMIM recorded in FMIF account ledger 14000 ("LMA Account") certain payments made to LMA from the property of the FMIF, and certain liabilities of LMIM to LMA which were satisfied from the balance of that account. The LMA Account ledger is available for inspection upon request;

(ii) from time to time, as recorded in the LMA Account:

(A) LMIM caused to be paid amounts to LMA from the property of the FMIF;

(B) if the position is as alleged in paragraph 41(b) above, those amounts did not include the LMA MPF Payments, notwithstanding their being recorded in the LMA Account as such;

(iii) the amounts paid to LMA and recorded in the LMA Account were not paid in satisfaction of sums previously invoiced or otherwise then due to LMA, except:

(A) if the position is as alleged in paragraph 41(a) above, between 30 April and 28 August 2012, 30 September and 3 October 2012, and 31 October and 21 November 2012, when the LMA Account recorded a debit balance;

(B) if the position is as alleged in paragraph 41(b) above, after 31 December 2010.

(i) ~~The particulars of the payments in advance and in anticipation are reflected in the particulars to paragraph 31 below.~~

(ii) ~~The plaintiff is not able to provide further and better particulars at this stage.~~

~~29-43.~~ LMIM did not:

- (a) pay interest to the FMIF on any amount which had been paid to it at its direction in advance or in anticipation from time to time, namely on the debit balance of the LMA Account, as pleaded in the immediately preceding paragraph; or
- (b) account for interest to the FMIF on any such amount.

~~30-44.~~ In the premises, LMIM obtained the benefit of the payments in advance or anticipation pleaded in paragraph 42 above.

Particulars.

- (a) ~~At most times during this period there were substantial amounts which had been paid at the direction of LMIM in advance or in anticipation, as pleaded in paragraph 28 above.~~
- (b) ~~Particulars of the totality of the benefit obtained will be provided by way of an expert report.~~

~~31-45. Further and in the alternative, from time to time from at least 1 July 2007 until 30 June 2013, LMIM caused Service Fees amounts to be prepaid paid to LMA; from the assets property of the FMIF in anticipation and in advance of its liabilities from time to time to pay Service Fees or other fees or expenses.~~

Particulars.

The Plaintiff repeats the particulars in paragraph 42 above.

- (a) ~~The amounts pre paid to LMA from time to time are the amounts paid to or at the direction of LMIM in advance or in anticipation, as pleaded in paragraph 28 above.~~
- (b) ~~A copy of the account ledger (number 14000) from 1 July 2007 to 30 June 2013 is available on request.~~

~~32-46. LMIM was not under any obligation, under the Services Agreements or otherwise, to prepay pay Service Fees or other fees or expenses to LMA in advance.~~

~~33-47. LMA did not:~~

- (a) ~~pay interest to LMIM on any amount prepaid paid to it in advance or in anticipation from time to time, namely on the debit balance of the LMA Account, as pleaded in paragraph 45 above; or~~
- (b) ~~account for interest to the FMIF on any such amount.~~

Breach of Equitable and Statutory Duties

~~34-48. In the premises including of the matters set out in paragraphs 912, 1315, 1416, 15 and 32 and 46 above, each of the actions by LMIM referred to in paragraphs 2842 and 3145 above by LMIM were not authorised by the Constitution, by the PDS or by the Act.:~~

- (a) ~~were not authorised by and were not in accordance with the Constitution or the Act.~~
- (b) ~~did not preserve the property of the FMIF.~~

- (c) were not in the best interest of members of the FMIF; and
- (d) were such as to prefer its own interest where that interest may have been in conflict with the interests of the members of the FMIF in preserving the property of the FMIF.

49. Further and in the alternative, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in LMIM's position:

- (a) would not have paid the amounts referred to in paragraphs 42 and 45 above; or
- (b) would have charged interest to LMA on any credit in its account with the FMIF at a commercial rate being no less than the applicable rate from time to time for pre-judgment interest set under s.47 of the Supreme Court Act 1995 until 1 September 2012, and thereafter under s.58 of the Civil Proceedings Act 2011 ("Pre-Judgment Interest Rate").

~~35-50.~~ In the premises, each of the actions referred to in the ~~immediately preceding paragraph~~ paragraphs 42 and 45 above by LMIM was a breach of each of the Equitable Duties and each of the Statutory Duties.

Loss

~~36.~~ If LMIM had not taken the actions referred to in paragraph 34 above, the FMIF would have had the benefit of the amounts referred to in paragraphs 28 and 31 above.

~~37-51.~~ If LMIM had properly performed all of its duties as trustee and RE of the FMIF, the FMIF would have had the benefit of the amounts referred to in paragraphs 28 and 31 above either:

- (a) the use of the amounts referred to in paragraphs 42 and 45 above for the period before they were due and payable; or
- (b) the benefit of interest from LMA on those amounts, for those periods, at the rates pleaded in paragraph 49 above.

~~38.~~ Further to the immediately preceding paragraph:-

- (a) LMIM would have applied the amounts referred to in paragraphs 28 and 31 above to reduce the debts of the FMIF from time to time; and
- (b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.

39-52. In the premises, the FMIF was depleted and thereby suffered loss caused by LMIM's breaches of trust and contraventions of the Act as pleaded above.

Particulars.

(a) Particulars of the loss will be provided by way of an expert report

(a) The loss comprised the loss of use of funds, or alternatively lost interest, both of which are to be calculated by applying the Pre-Judgment Interest Rate to the balance of the LMA Account from day to day.

(b) Further particulars will be provided.

53. Further and in the alternative, the Court ought to allow interest on the amounts referred to in paragraphs 42 and 45 above, for the said periods, at the Pre-Judgment Interest Rate, or alternatively at such rate or rates as the Court considers appropriate.

III OVERPAYMENT OF THE RE MANAGEMENT FEE

54. In relation to each financial year from and including the financial year ended 30 June 2009 until the appointment of liquidators to LMIM on 26 July 2013, LMIM caused payments to be made to LMA from the property of the FMIF for the apparent purpose of:

(a) discharging the RE Management Fee which were payable to LMIM; and

(b) discharging the Service Fees which were payable by LMIM to LMA.

Particulars

The following aggregate amounts were paid from the property of the FMIF (excluding GST):-

(i) \$15,410,762 in the financial year ended 30 June 2009;

(ii) \$8,995,455 in the financial year ended 30 June 2010;

(iii) if the position is as alleged in paragraph 41(a) above, \$10,997,188 in the financial year ended 30 June 2011;

(iv) if the position is as alleged in paragraph 41(a) above, \$9,103,864 in the financial year ended 30 June 2012;

(v) if the position is as alleged in paragraph 41(a) above, \$4,519,156 for the period from 1 July 2012 to 18 March 2013.

~~40. LMA received Service Fees purportedly payable by or on behalf of LMIM as RE of the FMIF in the following financial years in the following aggregate amounts:-~~

~~(a) \$15,410,762 in the financial year ended 30 June 2009;~~

~~(b) \$8,995,455 in the financial year ended 30 June 2010;~~

~~(c) \$10,997,188 in the financial year ended 30 June 2011;~~

~~(d) \$9,103,864 in the financial year ended 30 June 2012.~~

Overvaluation of the Net Fund Value

~~55. In the premises of paragraphs 13(f), 14, 26 and 27 above, the RE Management Fee and the Service Fees were required to be calculated by reference to the value of the Scheme Property.~~

~~56. From about mid-2008, the Plaintiff did not:~~

~~(a) generally obtain regularly updated external valuations of all Secured Properties; and~~

~~(b) did not reduce the value of the Scheme Property in its financial accounts to reflect any estimated shortfall in recovery of the loans which comprised Scheme Property.~~

~~41-57. In respect of each financial year at least from and including about the financial year ended ending 30 June 2009:-~~

~~(a) the value of the real property security assets securing a significant number of the loans made on behalf of the FMIF Secured Properties were significantly overvalued in the accounts of the FMIF, such that the realisable value of the Secured Properties was insufficient to meet the obligations under the Borrower's loan facility;~~

~~(b) a significant number of the loans made on behalf of the FMIF were in default; for non-payment or were otherwise impaired;~~

~~(c) as a consequence, the value of the Scheme Property (and thus the Net Fund Value) was materially overstated in the accounts of the FMIF.~~

Particulars:

~~(i) Particulars of value, impairment and overstatement to be provided in due course by way of an expert report.~~

~~42.58.~~ In the premises, and in respect of each financial year at least from and including about the financial year ending 30 June 2009, if the Net Fund Value had not been materially overstated in each such year, the RE Management Fee paid from the assets of the FMIF for that year would have been materially less than that which was in fact paid:

- ~~(a)~~ the RE Management Fee and the Service Fees would have been calculated at proportionately lower amounts;
- ~~(b)~~ the payments from the property of the FMIF for the apparent purpose of paying these fees would have been proportionately lower amounts.

~~43.59.~~ At all material times at the latest from about October 2008, LMIM:-

- ~~(a)~~ was aware that the FMIF was exposed to uncertainty in and the weakening of property markets in Australia caused by the occurrence of the global financial crisis;
- ~~(b)~~ adopted as its general strategy in relation to the real property assets securing loans and receivables which fell into default, or where the borrower otherwise faced a difficult financial position, to hold the properties until the property market rebounds; and
- ~~(c)~~ did not cause on a timely basis updated independent valuations to be obtained of the real property security assets securing the loans made on behalf of the FMIF in a significant number of cases and instead utilised out-of-date valuations and/or other inappropriate or inadequate information for the purposes of ascribing a value to the real property securities held.

~~44.60.~~ In the premises of the matters set out in paragraph 4359, LMIM was aware, or ought reasonably to have been aware, of the matters set out in paragraphs 4157 and 4258 above.

Payments by MPF

~~45.~~ LMIM as trustee of the MPF caused payments to be made to LMA or to LMIM from the assets of the MPF as follows:-

- ~~(a)~~ in the financial year ended 30 June 2010, in aggregate of approximately \$51,000; and
- ~~(b)~~ in the financial year ended 30 June 2011, and between and including 10 November 2010 and 25 May 2011, in the aggregate amount of approximately \$10.409million;

~~(“MPF Prepaid Service Fee Payments”).~~

~~46.~~ The MPF Prepaid Service Fee Payments were recorded by LMIM:

- (a) ~~in the accounts of the FMIF, as being in partial satisfaction of the KPG Consideration and the Lifestyle Consideration;~~
- (b) ~~in the cases of payments made to LMA, in the accounts of LMIM as being in payment or prepayment of Service Fees;~~
- (c) ~~in the case of payments made to LMIM, in the accounts of LMIM:~~
 - (i) ~~as being in payment or payment in advance of RE Management Fees, or in response to or anticipation of LMIM becoming liable to LMA for Service Fees in relation to the FMIF; and~~
 - (ii) ~~not as an assets of the FMIF.~~

Breach and loss

~~47.61. In the premises of the matters set out in paragraphs 4334, 59 and 4460 above, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in the RE's position, would have obtained external valuations of the real property security assets securing the loans made on behalf of the FMIF.~~

~~48.62. In the premises, LMIM breached the Equitable Duty set out in paragraph 20(a) above and the Statutory Duty set out in paragraph 21(a) above:~~

- ~~(a) the Equitable Duty set out in paragraph 32(b) above;~~
- ~~(b) the Statutory Duty set out in paragraph 33(a) above; and~~
- ~~(c) its further duties set out in paragraph 34 above.~~

Loss

~~49. In respect of each financial year including and following the financial year ended 30 June 2010, if the Net Fund Value had not been materially overstated, the FMIF would have had the benefit of the extent of each overpayment of the Service Fees, from the time of each overpayment.~~

~~63. From about the financial year ending 30 June 2009, if LMIM had properly performed its said duties:~~

- ~~(a) the Net Fund Value would not have been materially overstated;~~

- (b) the RE Management Fee and the Service Fees would have been calculated and paid on the basis of the correct Net Fund Value;
- (c) the FMIF would not have been depleted by the difference between the amount of the relevant fees paid and the amount that should have been paid;
- (d) the FMIF would have had the benefit of the use of the funds which were in fact depleted.

50. Further and in the alternative, if:

- (a) the Net Fund Value had not been materially overstated; and
- (b) the MPF Prepaid Service Fee Payments had the effect ascribed to them in the accounts of the FMIF and LMIM as pleaded in paragraph 46 above (which is not admitted);
the MPF Prepaid Service Fee Payments, or some part of them, would never have been applied to payment of fees payable to LMA on behalf of LMIM from the assets of the FMIF.

51. If LMIM had properly performed all of its duties as trustee and as RE of the FMIF, the FMIF would have had the benefit of each of the amounts referred to in paragraphs 49 and 50 above.

52. Further to the immediately preceding paragraph:-

- (a) LMIM would have applied the amounts referred to in paragraphs 49 and 50 above to reduce the debts of the FMIF from time to time; and
- (b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.

53.64. In the premises, the FMIF was depleted and thereby suffered loss caused by LMIM's breaches of trust and contraventions of the Act as pleaded above.

Particulars.

- (a) Further particulars ~~to~~will be provided in due course and by way of ~~an~~after an expert report has been obtained.

Payment of IV AGENCY PAYMENTS AND MSA LOAN MANAGEMENT FEES

Background

54.65. In each financial year from and including the financial year ended 30 June 2011, and in relation to each loan of the FMIF where PTAL or LMIM as RE of the FMIF on its behalf was in possession,

or had control, of property comprising security for that loan, LMIM caused LMA to be paid management fees from the assets of the FMIF, ~~purportedly~~ for loan management and ~~controllership services, or services relating to the sale of real estate assets~~ ("Loan Management Fees").

~~55-66.~~ The Loan Management Fees were in addition to the RE Management Fees and the Service Fees.

~~56.~~ In the financial year ended 30 June 2011, LMIM caused LMA to be paid Loan Management Fees in the amount of \$5,381,516.

~~67.~~ The Loan Management Fees were either Agency Payments made under an Agent's Indemnity referred to in paragraphs 71 to 72 below, or MSA Loan Management Fees made under a Management Services Agreement referred to in paragraph 76 below.

Agency Payments

~~68.~~ From about 2010, PTAL and LMIM executed a series of documents entitled "Appointment of Agent" ("Agent Appointments").

Particulars

Particulars of the Agent Appointments are provided in the Consolidated Particulars at paragraph 63.

~~69.~~ Each of the Agent Appointments related to one or more Secured Properties which were the subject of one or more Securities provided by a particular Borrower.

~~70.~~ Each of the Agent Appointments (by clause 1) appointed LMIM as the agent of PTAL to exercise all of its rights, powers, privileges, benefits, discretions and authorities conferred on PTAL under one or more Securities provided by the particular Borrower over one or more Secured Properties.

~~71.~~ At or about the time each of the Agent Appointments was executed, PTAL and LMIM also executed a further associated document entitled "Agent's Indemnity" ("Agent's Indemnities").

Particulars.

Particulars of the Agent Appointments are provided in the Consolidated Particulars at paragraph 63.

~~72.~~ Each of the Agent's Indemnities provided that (inter alia):

~~(a)~~ (Clause 1) PTAL agreed, subject to Clause 2, to indemnify LMIM against liabilities for or arising out of all actions, proceedings, claims, suits and demands, and all payments, costs and expenses incurred by LMIM in or arising out of the due exercise or purported

exercise rights, powers, discretions or authorities vested in LMIM by the associated Agent's Appointment; and

(b) (Clause 3) PTAL agreed to pay to LMIM all reasonable charges, costs, fees and expenses payable to or incurred by LMIM in relation to the agency ("Agency Payments").

73. PTAL executed the Agent Appointments and Agent's Indemnities on the instructions of LMIM and as agent for LMIM.

Particulars.

(a) PTAL was appointed as agent of LMIM pursuant to the Custody Agreement pleaded in paragraphs 16 and 17.

(b) By reason of clauses 3.1 and 4.1 of the Custody Agreement and the facts pleaded in paragraphs 68 and 70 above, it is to be inferred that PTAL executed the Agency Appointments and the Agent's Indemnities on the instructions of LMIM and as its agent.

74. The Agency Payments were:

(a) separate and in addition to the Service Fees and the Resources Fees, the MSA Loan Management Fees (defined in paragraph 76 below) and the RE Management Fee; and

(b) not specified in the Constitution as a fee to which LMIM was entitled, or as a cost for which LMIM is entitled to be indemnified.

75. Further and in the alternative, the way in which the Agency Payments were to be calculated was not specified in the Constitution.

LMA Management Services Agreements

57-76. On or about 1 July 2011, and from time to time thereafter, and in respect of each loan/loans of the FMIF where PTAL or LMIM as RE of the FMIF on its behalf was in possession, or had control, of property comprising security for that loan, LMIM caused PTAL as custodian to enter into a series of Management Services Agreements ("Management Services Agreements") with itself and LMA which had effect from 1 July 2011, pursuant to which:-

(a) LMA was engaged to perform services, including as an agent exercising powers under the security for the loan in question ("Loan Management Services"); and

(b) PTAL agreed to pay service fees (also - ("MSA Loan Management Fees"), being comprising one or more of the following fees:

- (i) in every case, general administrative fees charged on an hourly rate basis (based on the fee earner's title, as scheduled); and
 - (ii) in some but not all cases, a development management fee, as a percentage of 'total development build cost', which varied between 2.5% and 3% thereof; and
 - (iii) in some but not all cases, a marketing and sales management fee of 2% of gross sales proceeds where LMA undertakes the sale of assets directly on behalf of PTAL/the RE, or one per cent where PTAL/the RE elects to appoint an external real estate agent;
- (c) (“LMA, PTAL and LMIM agreed that PTAL was entitled to terminate the agreement:
- (i) by 7 days written notice to LMA, at any time; or
 - (ii) immediately, if LMA was the subject of an Insolvency Event, including the appointment of an administrator as defined by section 9 of the Corporations Act 2001 (Cth).

Particulars.

Particulars of the Management Services Agreements²² are provided in the Consolidated Particulars at paragraph 70.

Particulars:

~~A Management Services Agreement was executed in respect of the loans to Bellpae Pty Ltd; DBTM Pty Ltd (formerly Bezzina Developers Pty Ltd) at the Jindabyne Unit Trust; Brambleton Pty Ltd; Bridgewater Lake Estate Ltd; Cameo Estates Lifestyle Villages (Launceston) Pty Ltd; Carrington Management Pty Ltd at the Carrington Discretionary Trust; Coulter Developments Pty Ltd and Rocola Pty Ltd; Eden Apartments Pty Ltd; Glendenning Developments Pty Ltd; Green Square Property Development Corporation Pty Ltd; Greystanes Projects Pty Ltd; Kingopen Pty Ltd; Lot 111 Pty Ltd; Magnolia Grove Investments Pty Ltd; Northshore Bayview St Pty Ltd at the Northshore Bayview No 1 Unit Trust; OVST Pty Ltd; Redland Bay Leisure Life Pty Ltd; Redland Leisure Life Development Pty Ltd at the Redland Bay Leisure Life Development Partnership; Madrers Properties Pty Ltd at the Madrers 32-34 Marine Parade; Kingsliff Trust; Lea Developments Pty Ltd at the JAL Trust and PWB Properties Pty Ltd at the Brinsmead 32-34 Marine Parade; Kingsliff Trust; Source Developments No 1 Pty Ltd; Source Student Lodge Pty Ltd; St Crispin's Property Pty Ltd at The St Crispin's Property Trust; Townsville Commercial Pty Ltd; U Own Storage (Southbank) Pty Ltd; Young Land Corporation Pty Ltd at Cavill Park Unit Trust; and Young Land Corporation Pty Ltd.~~

77. PTAL executed the Management Services Agreements on the instructions of LMIM and as agent for LMIM.

Particulars.

(a) PTAL was appointed as agent of LMIM pursuant to the Custody Agreement pleaded in paragraphs 16 and 17.

(b) By reason of clauses 3.1 and 4.1 of the Custody Agreement and the facts pleaded in paragraph 76 above, it is to be inferred that PTAL executed the Management Services Agreements on the instructions of LMIM and as its agent.

78. The MSA Loan Management Fees were:

(a) separate and in addition to the Service Fees and the Resources Fees, the Agency Payments and the RE Management Fee; and

(b) not specified in the Constitution as a fee to which LMIM was entitled, or as a cost for which LMIM is entitled to be indemnified.

79. Further and in the alternative, the way in which the MSA Loan Management Fees were to be calculated was not specified in the Constitution.

Payments

80. In relation to the financial year ended 30 June 2011, LMIM caused to be paid at its direction Agency Payments from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.

Particulars:

(a) If the position is as alleged in paragraph 41(b) above, the amount paid was in the amount of \$5,714,136.95 (inclusive of GST), as further particularised in the Consolidated Particulars at paragraph 73.

(b) Further particulars will be provided.

~~58.81. In relation to the financial year ended 30 June 2012, LMIM caused LMA to be paid Loan Management Fees in the amount of \$4,817,414 to be paid at its direction Agency Payments and, further or in the alternative, MSA Loan Management Fees, from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.~~

Particulars.

~~(a) If the position is as alleged in paragraph 41(a) above, the amount paid was in the amount of \$4,869,620.40 (inclusive of GST), as further particularised in the Consolidated Particulars at paragraph 74.~~

~~(b) Further particulars will be provided.~~

~~59.82. In relation to the period from 1 July 2012 until 28 February 2013, LMIM caused LMA to be paid Loan Management Fees in the amount of \$2,304,636 to be paid at its direction Agency Payments and, further or in the alternative, MSA Loan Management Fees, from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.~~

Particulars.

~~(a) If the position is as alleged in paragraph 41(a) above, the amount paid was in the amount of \$2,153,050.02 (inclusive of GST), as further particularised in the Consolidated Particulars at paragraph 75.~~

~~(b) Further particulars will be provided.~~

MPF Loan Management Fee Payments

~~60. Between and including 10 November 2010 and 25 May 2011, LMIM as trustee of the MPF caused further payments to be made to LMA from the assets of the MPF in the sum of \$3.28 million ("MPF Loan Management Fee Payments").~~

~~61. The MPF Loan Management Fee Payments were recorded by LMIM in the accounts of the FMIF as being:~~

~~(a) in partial satisfaction of the KPG Consideration and the Lifestyle Consideration; and~~

~~(b) in payment of some of the Loan Management Fees referred to in paragraph 56 above.~~

83. In relation to the period from 1 March 2013 to 30 June 2013, LMIM caused to be paid at its direction Agency Payments and, further or in the alternative, MSA Loan Management Fees, from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.

Particulars.

(a) If the position is as alleged in paragraph 41(a) above, the amount paid was in the amount of \$983,359.63 (inclusive of GST), as further particularised in the Consolidated Particulars at paragraph 76.

(b) Further particulars will be provided.

Breach of Equitable and Statutory Duties – Agency Payments Unauthorised

84. In the premises of paragraphs 17, 18, 73 and 75 above, no agreement or arrangement for the payment of the said Agency Payments from the property of the FMIF were of any legal effect.

85. In the premises of the immediately preceding paragraph:

62. In the financial year ended 30 June 2011, neither LMIM nor PTAL were under any obligation, under the Services Agreements or otherwise, to pay Loan Management Fees to LMA.

(a) LMIM had no entitlement to receive payment of any of the said Agency Payments from the property of the FMIF; and

63. In the financial year ended 30 June 2011,

(b) the payment of each of the said Agency Payments Loan Management Fees from the assets property of the FMIF to LMA was not authorised by or in accordance with the Constitution, by the PDS, or by the Act.

86. In the premises, the actions of LMIM in paying each of the said Agency Payments from the property of the FMIF were in breach of the duties set out in paragraphs 32(a) and 33(c) above.

64. In each of the financial years ended 30 June 2012 and 30 June 2013:-

(a) LMIM was solely responsible for and empowered to direct PTAL as to all actions and decisions in relation to the assets of the FMIF, including as to the exercise of any powers pursuant to any real property securities held by PTAL as agent for LMIM as RE for the FMIF;

(b) LMIM had already engaged LMA under a Services Agreement to perform services, which included the services which it also caused PTAL to contract with LMA to provide by the Management Services Agreements.

65. In the premises of the matters set out in paragraphs 62 to 64 above, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in the RE's position:-

(a) would not have entered into any of the Management Services Agreements, or caused PTAL to do so;

(b) would not have caused the Loan Management Fees to be paid from the assets of the FMIF, in any of the financial years ended 30 June 2011, 30 June 2012 and 30 June 2013.

66. In the premises, the actions of LMIM were in a breach of each of the Equitable Duties and each of the Statutory Duties.

Breach - MSA Loan Management Fees Unauthorised

87. In the premises of paragraphs 13(d), 13(h)(i), 13(h)(ii), 17 to 22, 77 and 79 above, no agreement or arrangement for the payment of the said MSA Loan Management Fees from the property of the FMIF were of any legal effect.

88. In the premises of the immediately preceding paragraph:

(a) LMIM had no entitlement to an indemnity from the property of the FMIF for any of the liabilities which it incurred to PTAL or LMA under the Management Services Agreements for the MSA Loan Management Fees; and

(b) payment of any of the MSA Loan Management Fees from the property of the FMIF was not otherwise authorised by or in accordance with the Constitution or the Act.

89. In the premises, the actions of LMIM in paying each of the MSA Loan Management Fees from the property of the FMIF were in breach of the duties set out in paragraphs 32(a) and 33(c) above.

Breach -- Agency Payments and MSA Loan Management Fees Not Properly Incurred

90. At all material times, and in the premises of paragraphs 13(h)(i), 26 and 27 above, LMIM had already engaged LMA under a Services Agreement and, later, the Resources Agreement, to perform

services which included loan management services and services relating to the sale of real estate assets for the FMIF.

91. At all material times, in relation to each Borrower in relation to whom Agency Payments and further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), the Borrower was in default of their loan from the FMIF.

92. At all material times, in relation to each Borrower in relation to whom Agency Payments and further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), LMIM was aware, or ought reasonably to have been aware, that there was a real risk that there would be a shortfall in recovery under that loan such that the said Agency Payments and, further or in the alternative, MSA Loan Management Fees would not be recoverable from the said Borrower, after accounting for principal and interest.

Particulars

It is to be inferred that LMIM was so aware from:

- (a) The matters pleaded in paragraph 91 above; and
- (b) Further particulars will be provided in due course.

93. The amount of the Agency Payments and, further or in the alternative, MSA Loan Management Fees was not calculated by reference to the cost to LMIM or LMA of providing the services for which they were charged.

94. At all material times from the execution of the Resources Agreement, the cost to LMIM and LMA of providing the services for which the Agency Payments and, further or in the alternative, MSA Loan Management Fees were charged, including the salary of each fee earner whose time was included in the calculation thereof, was separately recovered from the property of the FMIF as a component of the Resources Fee.

95. At all material times, and in the premises of paragraph 8(c) and 76(c) above:

- (a) prior to 19 March 2013, LMIM was entitled to instruct PTAL to terminate any of the Management Services Agreements on seven days' notice;
- (b) on and from the appointment of administrators to LMA on 19 March 2013, LMIM was entitled to instruct PTAL to terminate any of the Management Services Agreements without prior notice;

96. If LMIM had instructed PTAL as pleaded in the immediately preceding paragraph:
- (a) PTAL would have complied with that instruction and given notice to LMA terminating the said Management Services Agreement either on seven days' notice, or immediately, as the case may be;
 - (b) LMA would have continued to provide the loan management services and services relating to the sale of real estate assets for the FMIF pursuant to the Services Agreements (or, later, the Resources Agreement).
97. In the premises of the matters set out in paragraphs 84 to 96 above, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in LMIM's position:-
- (a) would not have or caused PTAL to have entered into any of the Agent's Indemnities or any of the Management Services Agreements in terms permitting the said Agency Payments and the MSA Loan Management Fees to be charged;
 - (b) would not have charged any of the said Agency Payments to PTAL;
 - (c) would not have caused any of the said Agency Payments or any of the MSA Loan Management Fees to be paid from the property of the FMIF;
 - (d) further and in the alternative, would subsequently:
 - (i) have caused each of the Agent's Indemnities to be varied so as not to allow for the said Agency Payments to be charged to PTAL, or alternatively would have ceased charging the said Agency Payments to PTAL;
 - (ii) have caused PTAL to terminate each of the Management Services Agreements.
98. In the alternative, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in LMIM's position, would:
- (a) have charged Agency Payments to PTAL in a lower amount;
 - (b) have negotiated, or subsequently renegotiated the terms of each of the said Loan Management Agreements to provide for lower fees.
99. In the premises of the matters set out in paragraphs 84 to 97 above, LMIM:
- (a) in relation to each of the Agent's Indemnities and the payment of each of the said Agency Payments, preferred its own interests to the interests of the members of the FMIF;

(b) in relation to each of the Agent's Indemnities, each of the said Agency Payments, each of the Management Services Agreements, and each of the said MSA Loan Management Fees, failed to act in the best interests of the members of the FMIF.

100. In the premises of paragraphs 86, 89, 97, 98 and 99 above, the actions of LMIM were in a breach of each of the Equitable Duties and each of the Statutory Duties.

Loss to the FMIF

67.101. If LMIM had not acted in breach of the Equitable Duties and the Statutory Duties, and had properly performed all of its duties as trustee and RE of the FMIF:-

(a) it would not have entered into any of the Agent's Indemnities in terms which permitted the said Agency Payments to be charged by it to PTAL;

(a)(b) it would not have entered into any of the Management Services Agreements, or caused PTAL to do so;

(c) alternatively to sub-paragraphs (a) and (b), it would have:

(i) caused each of the Agent's Indemnities to be varied so as not to allow for the said Agency Payments to be charged to PTAL;

(ii) caused PTAL to terminate each of the Management Services Agreements;

(d) it would have itself or would have caused LMA to carry out each of the services the subject of the Agent's Appointments and the Management Services Agreements, for no additional expense to the FMIF;

(e) none of the said Agent's Payments or the said MSA Loan Management Fees would have been paid from the property of the FMIF.

(b) it would not have caused LMA to be paid any Loan Management Fees;

(c) the FMIF would have had the benefit of the amounts of the Loan Management Fees which were paid.

68.102. Further to the immediately preceding paragraph:-

(a) LMIM would have applied the amount of the said Agent's Payments and the MSA Loan Management Fees which were paid to LMA instead to reduce the debts of the FMIF from time to time; and

(b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.

103. In the case of each Borrower in relation to whom Agency Payments and, further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), there has been a shortfall in recovery under their loan, such that there has been no recovery from the Borrower of the said Agency Payments and, further or in the alternative, MSA Loan Management Fees, after accounting for principal and interest.

~~69-104.~~ In the premises, the FMIF was depleted and thereby suffered loss-caused damage by LMIM's breaches of trust and contraventions of the Act as pleaded above.

Particulars

The loss suffered by the FMIF included:-

(a) The ~~If the position is as alleged in paragraph 41(a) above, the amount of \$12,503,566~~13,720,167.00, being the amount of the Agent's Payments and, further or in the alternative, the MSA Loan Management Fees which were paid to LMA pleaded in paragraphs 56, 58 and 59, assuming that the MPF Loan Management Fee Payments had the effect ascribed to them in the accounts of the ~~caused by LMIM to be paid from the FMIF as pleaded in paragraph 61 above (which is not admitted).~~ paragraphs 80 to 82(a) above.

(b) Interest on that amount, at the ~~rates of interest~~Pre-Judgment Interest Rate from time to time set out in paragraph 19 above, or alternatively at such rate or rates as the Court considers appropriate.

(c) Further particulars will be provided.

V PAYMENTS TO FEEDER FUNDS

Background

~~70-105.~~ In the financial year ended 30 June 2010, LMIM as trustee of the MPF made various payments for the benefit of each of ~~and if the Feeder Funds~~ position is as alleged in paragraph 41(a) above. LMIM as trustee of the MPF made Feeder Fund Payments in the aggregate amount of approximately \$2,500,000.

~~71-106.~~ In the financial year ended 30 June 2011, LMIM as trustee of the MPF made various payments for ~~and if the benefit of each of the Feeder Funds~~ position is as alleged in paragraph 41(a) above. LMIM as trustee of the MPF made Feeder Fund Payments in the aggregate amount of \$10,431,836 (together with the payments referred to in paragraph 70 above, the "Feeder Fund Payments").

72. The Feeder Fund Payments were recorded by LMIM in the accounts of the FMIF as being in partial satisfaction of the KPG Consideration and the Lifestyle Consideration.

Breach of Equitable and Statutory Duties

~~73.107.~~ If the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded~~If the position is as alleged in paragraph 72 above (which is not admitted),~~ 41(a) above, in respect of each of the Feeder Fund Payments made from time to time:-

- (a) the payment was not made in satisfaction of any amount presently due and payable by LMIM as RE of the FMIF to the Feeder Fund in question; and
- (b) the payment was not otherwise authorised by or in accordance with the Constitution, ~~by the PDS, or by the Act.~~

~~74.108.~~ In respect of each of the Feeder Fund Payments, if they had the effect ascribed to them in the accounts of the FMIF~~If the position is as pleaded~~ alleged in paragraph 72~~41(a) above (which is not admitted),~~ LMIM by making the payment:-

- (a) preferred the interests of the members of the Feeder Fund in question to the interests of the members of the FMIF; and
- (b) further and in the alternative, preferred its own interests as a member of the FMIF to the interests of the other members of the FMIF.

~~75.109.~~ In the premises, if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded~~position is as alleged in paragraph 72~~ 41(a) above (which is not admitted), the payment of the Feeder Fund Payments was a breach of, LMIM breached:-

- (a) each of the Equitable Duties and;
- ~~(a)(b)~~ each of the Statutory Duties; and
- (c) its further duty under s.601FC(1)(d) of the Act to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly.

Loss

~~76.110.~~ If the position is as alleged in paragraph 41(a) above, LMIM as RE of each of the Feeder Funds did not repay any of the Feeder Fund Payments to the FMIF.

~~77.111.~~ If LMIM had properly performed all of its duties as trustee and RE of the FMIF, and ~~if~~ the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF~~position is as pleaded~~ alleged in paragraph 72~~41(a) above (which is not admitted):-~~

- (a) LMIM would not have caused the amounts of each of the Feeder Fund Payments to be paid for the benefit of the Feeder Funds;

(b) the FMIF would have had the benefit of the amounts of each of the Feeder Fund Payments.

~~78. Further to the immediately preceding paragraph:-~~

~~(a) LMIM would have applied the amounts of the Feeder Fund Payments to reduce the debts of the FMIF from time to time; and~~

~~(b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.~~

~~79.112. In the premises, and if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF position is as pleaded alleged in paragraph 7241(a) above (which is not admitted), the FMIF suffered loss caused by LMIM's breaches of trust and contraventions of the Act as pleaded above.~~

Particulars.

The loss suffered by the FMIF included:-

(a) The amount of approximately \$12,931,836, being the amount of the Feeder Fund Payments.

(b) Interest on that amount, at the ~~rates of interest~~ Pre-Judgment Interest Rate from time to time ~~set out in paragraph 19 above, or alternatively at such rate or rates as the Court considers appropriate.~~

The Plaintiff claims the following relief:-

1. A declaration that by:

(a) causing the amounts to be paid in anticipation of the RE Management Fee (as defined in paragraph ~~10(d)13(f)~~ of the Statement of Claim) ~~to be paid at its direction, from the assets property~~ of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), in advance of performing or causing to be performed the duties and obligations in respect of which the RE Management Fee was to be payable, ~~from the assets of the FMIF;~~

(b) causing further amounts to be paid at its direction, from the assets of the FMIF, in anticipation of LMIM becoming liable to LM Administration Pty Ltd ACN 055 691 426 ("LMA") for Service Fees in relation to the FMIF additional to the RE Management Fee;

(c) further and in the alternative, causing the Service Fees and the Resources Fees (as defined in paragraphs ~~18(b)~~26(b), 27(c) and ~~2842~~ of the Statement of Claim) to be prepaid to LMA, from the assets of the FMIF, in circumstances where there was already a debit balance in the LMA Account (as defined in paragraph 42 of the Statement of Claim).

the Defendant ("LMIM") acted in breach of its trust of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), and in contravention of section 601FC(1) of the *Corporations Act 2001* ("Act").

2. A declaration that, by failing to cause updated independent valuations to be obtained of the real property security assets securing a significant number of the loans made on behalf of the FMIF, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act
3. A declaration that, by causing the Loan Management Fees (as defined in paragraphs ~~54 and 57~~paragraph 65 of the Statement of Claim) to be paid to LMA from the assets of the FMIF in the financial years ended 30 June 2011, 30 June 2012 and 30 June 2013, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
4. A declaration that, by causing the Feeder Fund Payments (as defined in paragraphs ~~70 and 74~~41(a)(ii), 105 and 106 above) to be made, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
5. A declaration that, by reason of LMIM's breaches of trust and contraventions of the Act referred to in paragraphs 1 to 4 hereof, LMIM caused loss to the FMIF, in an amount to be assessed by this Honourable Court.
6. A declaration that LMIM's right to be indemnified from the assets of the FMIF is limited to the balance between what LMIM would otherwise be entitled by way of indemnity, and the extent of LMIM's obligation to reconstitute the FMIF for the losses caused to the FMIF by its breaches of trust or, further and in the alternative, its contraventions of the Act.
7. ~~Against~~Further and in the alternative, against the Defendant:
 - (a) equitable compensation; and
 - (b) compensation pursuant to section 1317H(1) of the Act,to be paid including by reference to LMIM's right to be indemnified from the assets of the FMIF, as set out in paragraph 6, but only to the extent of that right.

8. Such further or other orders as may to the Court seem meet, including orders for the adjustment of the account between LMIM and the FMIF to properly account for the liability of LMIM to reconstitute the FMIF.

8.9. Interest pursuant to s 58 of the *Civil Proceedings Act 2011 (Qld)* at such rate and for such period as this Honourable Court deems fit.

9.10. Costs.

Signed:


Tucker & Cowen

Description: Solicitors for the Plaintiff

This pleading was settled by Mr Derrington of Queens Counsel with Mr Ananian-Cooper of Counsel.

The amendments to this pleading were settled by Mr McKenna of Queens Counsel with Mr Ananian-Cooper of Counsel.

NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 11560/16

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

AND

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

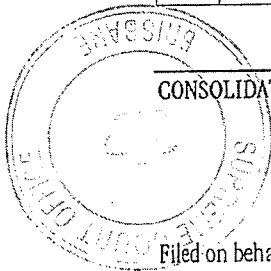
Filed in the Brisbane registry on: July 2017

PLAINTIFF'S CONSOLIDATED PARTICULARS

The Amended Statement of Claim ("Statement of Claim") is further particularised as follows:-

68. As to paragraphs 68 and 71 of the Statement of Claim, Agent Appointments and Agents' Indemnities as referred to in those paragraphs were executed by the following Borrowers on the following dates:

No.	Borrower	Date of Agent Appointment	Date of Agent's Indemnity
1.	Apotel Pty Limited ACN 108 263 903	Undated	Undated
2.	Australian International Investment Services Pty Ltd ACN 102 261 898	30 May 2013	30 May 2013
3.	Brambleton Pty Ltd (Controller Appointed) ACN 118 835 742	30 May 2013	30 May 2013



CONSOLIDATED PARTICULARS

Filed on behalf of the Plaintiff

01344060-013

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Solicitors

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4.	Bridgewater Lake Estate Pty Limited (in liq.) ACN 086 203 787	1 April 2010	1 April 2010
5.	Cameo Estates Lifestyle Villages (Launceston) Pty Ltd ACN 098 955 296	9 February 2011	9 February 2011
6.	Coulter Developments Pty Ltd ACN 114 459 111	Undated	Undated
7.	Glee Investments Pty Ltd ACN 059 861 326	Undated	Undated
8.	Glendenning Developments Pty Ltd ACN 119 218 174	6 August 2012	6 August 2012
9.	Green Square Property Development Corporation Pty Ltd ACN 104 248 053	30 May 2013	30 May 2013
10.	Greystanes Projects Pty Ltd ACN 119 783 470	8 September 2011	8 September 2011
11.	Hidden Valley Pty Ltd ACN 124 458 975	1 February 2011	1 February 2011
12.	Inter Mail International Pty Ltd ACN 070 702 340	13 May 2011	13 May 2011
13.	Keppel Bay Holdings Pty Ltd ACN 107 192 843	1 February 2011	1 February 2011
14.	Keppel Views Pty Ltd ACN 111 200 036	1 February 2011	1 February 2011
15.	Kingopen Pty Ltd ACN 009 225 576	9 February 2011	9 February 2011
16.	LM Capalaba Pty Ltd ACN 132 298 353 & Balmoral Commodities Pty Ltd ACN 134 607 006	3 June 2013	3 June 2013
17.	Lot 111 Pty Ltd ACN 106 102 005	30 May 2013	30 May 2013
18.	Northshore Bayview ST. Pty Ltd ACN 111 109 418 IOR The Northshore Bayview No. 1 Unit Trust	18 May 2011	13 May 2011
19.	OVST Pty Ltd (in liq.) ACN 103 216 771	29 October 2010	29 October 2010
20.	Peregian Beach Pty Ltd ACN 127 412 864	9 July 2013	9 July 2013
21.	Pinevale Villas Morayfield Pty Ltd (in liq.) ACN 116 192 780	21 January 2014	21 January 2014
22.	Redland Bay Leisure Life Development Pty Ltd ACN 112 002 383	8 February 2011	8 February 2011
23.	Redland Bay Leisure Life Pty Ltd ACN 109 932 916	9 February 2011	9 February 2011
24.	Rocola Pty Ltd ACN 104 964 061	Undated	Undated
25.	St Crispin's Property Proprietary Limited ACN 104 769 244	Undated	Undated
26.	Source Developments No. 1 Pty Ltd ACN 126 999 871	Undated	Undated
27.	Townsville Commercial Pty Ltd ACN 108 680 986	29 November 2011	28 November 2011

28.	Young Land Corporation Pty Ltd ACN 102 989 686	20 November 2012	20 November 2012
29.	Young Project Marketing Pty Ltd (formerly known at "Tanby Rd Pty Ltd") ACN 107 193 813	Undated	1 February 2011

76. As to paragraph 76 of the Statement of Claim, the Management Services Agreements referred to in that paragraph were executed in respect of the loans to each of the following Borrowers:

No.	Borrower	Development Management Fee	Marketing and Sales Management Fee
1.	Bellpac Pty Ltd	Not applicable ("N/A")	N/A
2.	DBTM Pty Ltd (formerly Bezzina Developers Pty Ltd) atf the Jindabyne Unit Trust	N/A	Yes. At the rates pleaded in paragraph 76(b)(iii) of the Statement of Claim ("the Rate")
3.	Brambleton Pty Ltd	N/A	Yes. At the Rate
4.	Bridgewater Lake Estate Ltd	Yes. 3% of total development build cost	Yes. At the Rate
5.	Cameo Estates Lifestyle Villages (Launceston) Pty Ltd	N/A	Yes. At the Rate
6.	Carrington Management Pty Ltd atf the Carrington Discretionary Trust	N/A	N/A
7.	Coulter Developments Pty Ltd and Rocola Pty Ltd	N/A	Yes. At the Rate
8.	Eden Apartments Pty Ltd	N/A	Yes. At the Rate
9.	Glendenning Developments Pty Ltd	N/A	Yes. At the Rate
10.	Green Square Property Development Corporation Pty Ltd	N/A	Yes. At the Rate
11.	Greystanes Projects Pty Ltd	Yes. 3% of total development build cost	Yes. At the Rate
12.	Kingopen Pty Ltd	Yes. 3% of total development build	Yes. At the Rate

		cost	
13.	Lot 111 Pty Ltd	N/A	Yes. At the Rate
14.	Magnolia Grove Investments Pty Ltd	N/A	Yes. At the Rate
15.	Northshore Bayview St Pty Ltd atf the Northshore Bayview No 1 Unit Trust	N/A	Yes. At the Rate
16.	OVST Pty Ltd	N/A	Yes. At the Rate
17.	Redland Bay Leisure Life Pty Ltd	Yes. 2.5% of total development build cost	Yes. At the Rate
18.	Redland Bay Leisure Life Development Pty Ltd atf the Redland Bay Leisure Life Development Partnership	Yes. 2.5% of total development build cost	Yes. At the Rate
19.	Madrers Properties Pty Ltd atf the Madrers 32-34 Marine Parade, Kingscliff Trust, Lea Developments Pty Ltd atf the JAL Trust and PWB Properties Pty Ltd atf the Brinsmead 32-34 Marine Parade, Kingscliff Trust	N/A	Yes. At the Rate
20.	Source Developments No 1 Pty Ltd	Yes. 3% of total development build cost	Yes. At the Rate
21.	Source Student Lodge Pty Ltd	N/A	Yes. At the Rate
22.	St Crispin's Property Pty Ltd atf The St Crispin's Property Trust	N/A	Yes. At the Rate
23.	Townsville Commercial Pty Ltd	N/A	Yes. At the Rate
24.	U-Own Storage (Southbank) Pty Ltd	N/A	Yes. At the Rate
25.	Young Land Corporation Pty Ltd atf Cavill Park Unit Trust	N/A	Yes. At the Rate
26.	Young Land Corporation Pty Ltd	Yes. 3% of total development build cost	Yes. At the Rate

80. As to paragraph 80 of the Statement of Claim, the Plaintiff provides the following further particulars:

- (a) If the position is as alleged in paragraph 36(a) of the Statement of Claim, the aggregate amount paid from the property of the FMIF for loan management services or services

relating to the sale of real estate assets in relation to the financial year, of \$6,056,831.25, comprised:

- (i) on account of fees, the amount of \$5,324,536.70 plus adjustments relating to tax, totalling the amount of \$5,714,136.95 particularised in paragraph 80(a) of the Statement of Claim;
 - (ii) on account of expenses (in respect of which no claim is made), the amount of \$56,979.28, plus adjustments relating to tax; and
 - (iii) a further miscellaneous amount (in respect of which no claim is made) of \$262,349.50, plus adjustments relating to tax.
- (b) Further to sub-paragraph (a) hereof, the said amounts were paid by reducing the balance of the LMA Account, as follows:
- (i) on 31 December 2010, in the amount of \$1,593,200.00;
 - (ii) on 31 December 2010, in the amount of \$7,510,000.00, of which \$657,790.80 was referable to the said amounts;
 - (iii) on 30 June 2011, in separate amounts of \$3,499,434.66 and \$256,056.81; and
 - (iv) on 30 June 2011, in the further amount of \$1,000,000, of which \$50,348.98 was referable to the said amounts.
- (c) Further to sub-paragraphs (a) and (b) hereof:
- (i) the said adjusted amounts are the unadjusted amounts multiplied by 11 and divided by 10.25 ("RITC (75%) Adjusted Amount"); and
 - (ii) the difference between the RITC (75%) Adjusted Amount, and the un-adjusted amount, is the amount of the 75% reduced input tax credit available to LMIM for responsible entity services until 30 June 2012, if the un-adjusted amounts are taken to include the remaining 25% of GST.
- (d) LMA issued two invoices to LMIM for "Loan Management and Controllership Services", particulars of which are as follows:
- (i) Invoice dated 31 December 2010 for the "half year ended 31.12.2010", for:
 - (A) the sum of \$2,097,514.16;
 - (B) plus "Tax" of \$209,751.41;
 - (C) adding to a "Total" \$2,307,265.57;
 - (ii) Invoice dated 30 June 2011 for the "half year ended 30.06.2011", for:
 - (A) the sum of \$3,284,001.82;

- (B) plus "Tax" of \$328,400.18;
 - (C) adding to a "Total" of \$3,612,402.00.
- (e) Further to sub-paragraph (d) hereof, LMIM issued two invoices to PTAL for "Recovery of Loan Management and Controllershship Services", particulars of which are as follows:-
- (i) Invoice dated 31 December 2010, for the "half year ended 31.12.2010", for:
 - (A) the sum of \$2,097,514.16
 - (B) plus "Tax" of \$153,447.09;
 - (C) adding to a "Total" of \$2,250,991.25.
 - (ii) Invoice dated 30 June 2011, for the "half year ended 30.06.2011", for:
 - (A) the sum of \$3,284,001.82;
 - (B) plus "Tax" of \$240,293.50;
 - (C) adding to a "Total" of \$3,524,295.32.
81. As to paragraph 81 of the Statement of Claim, the Plaintiff provides the following further particulars:
- (a) If the position is as alleged in paragraph 36(a) of the Statement of Claim, the aggregate amount paid from the property of the FMIF for loan management services or services relating to the sale of real estate assets in relation to the financial year, of \$5,169,907.19, comprised:
 - (i) on account of fees, the amount of \$4,537,600.83, plus adjustments relating to tax, totalling the RITC (75%) Adjusted Amount of \$4,869,620.40 particularised in paragraph 81(a) of the Statement of Claim;
 - (ii) on account of expenses (in respect of which no claim is made), the amount of \$212,469.17, plus adjustments relating to tax; and
 - (iii) a further miscellaneous amount (in respect of which no claim is made) of \$67,343.52, plus adjustments relating to tax.
 - (b) Further to sub-paragraph (a) hereof, the said amounts were paid by:
 - (i) reducing the balance of the LMA Account in the aggregate amount of \$3,088,487.38, as follows:
 - (A) on 31 December 2011, in the amount of \$2,590,490.29; and
 - (B) on 30 April 2012, in the amount of \$497,997.09;

- (ii) reapplying a miscellaneous re-imbusement from LMA in the amount of \$8,214.00, on 21 June 2012; and
- (iii) making cash payments in the aggregate amount of \$2,073,205.81, as follows:
 - (A) on about 9 July 2012, the sum of \$625,000;
 - (B) on about 20 July 2012, the sum of \$376,523.47;
 - (C) on about 3 August 2012, the sum of \$625,000; and
 - (D) on about 10 August 2012, the sum of \$625,000, of which \$446,682.34 was referable to the said amounts.

82. As to paragraph 82 of the Statement of Claim, the Plaintiff provides the following further particulars:

- (a) If the position is as alleged in paragraph 36(a) of the Statement of Claim, the aggregate amount paid from the property of the FMIF for loan management services or services relating to the sale of real estate assets in relation to the period 1 July 2012 to 28 February 2013, of \$2,304,635.68, comprised:
 - (i) on account of fees, the amount of \$2,033,633.21, plus adjustments relating to tax, totalling the adjusted amount of \$2,153,050.02 particularised in paragraph 82(a) of the Statement of Claim; and
 - (ii) on account of expenses (in respect of which no claim is made), the amount of \$142,548.81, plus adjustments relating to tax.
- (b) Further to sub-paragraph (a) hereof, the said amounts were paid by:
 - (i) reducing the balance of the LMA Account in the aggregate amount of \$724,006.65, as follows:
 - (A) on 31 December 2012, in the amount of \$220,167.19;
 - (B) on 31 January 2013, in the amount of \$228,852.04; and
 - (C) on 28 February 2013, in the amount of \$274,987.42; and
 - (ii) making cash payments in the aggregate amount of \$1,580,629.03, as follows:
 - (A) on about 10 August 2012, the sum of \$625,000, of which \$178,317.66 was referable to the said amounts;
 - (B) on about 28 August 2012, the sum of \$165,065.71;
 - (C) on about 21 September 2012, the sum of \$383,819.87;
 - (D) on about 11 October 2012, the sum of \$252,633.47;

- (E) on about 16 November 2012, the sum of \$281,652.31; and
 - (F) on about 11 December 2012, the sum of \$319,140.01.
- (c) Further to sub-paragraphs (a) and (b) hereof, the said adjusted amounts are:
- (i) in relation to fees and expenses for July and August 2012, the RITC (75%) Adjusted Amount; and
 - (ii) thereafter, the un-adjusted amount multiplied by 11 and divided by 10.45 ("RITC (55%) Adjusted Amount"), such that the characteristic described in particular 80(c)(ii) above (substituting 45% for 25%) remains true in the context of the reduction in the available reduced income tax credit from 75% to 55%.
83. As to paragraph 83 of the Statement of Claim, the Plaintiff provides the following further particulars:
- (a) If the position is as alleged in paragraph 36(a) of the Statement of Claim, the aggregate amount paid from the property of the FMIF for loan management services or services relating to the sale of real estate assets in relation to the period 1 March 2013 to 30 June 2013, of \$999,889.10, comprised:
 - (i) on account of fees, the amount of \$934,191.65 plus adjustments relating to tax, totalling the RITC (55%) Adjusted Amount of \$983,359.63 particularised in paragraph 83(a) of the Statement of Claim;
 - (ii) on account of expenses (in respect of which no claim is made), the amount of \$15,703.00, plus adjustments relating to tax.
 - (b) LMIM issued invoices to "LM First Mortgage Income Fund" for "Loan Management Fees", particulars of which are as follows:
 - (i) Invoice numbered 1106 dated 31 March 2013 for "the month of March 2013" for an amount inclusive of GST of \$230,949.04;
 - (ii) Invoice numbered 1108 dated 19 April 2013 for "the period 1 April 2013 to 19 April 2013" for an amount inclusive of GST of \$149,829.65;
 - (iii) Invoice numbered 1109 dated 30 April 2013 for "the period 20 April 2013 to 30 April 2013" for an amount inclusive of GST of \$128,242.79; and
 - (iv) Invoice numbered 1118 dated 31 May 2013 for "the period 1 May 2013 to 31 May 2013" for an amount inclusive of GST of \$276,441.22.

- (c) LMA issued invoice 8973Inv003 to PTAL dated 31 May 2013 for "Loan Management Fees March 2013 to May 2013" for the aggregate of the amounts of the invoices referred to in sub-paragraph (b) above:
- (i) which stated "This invoice replaces previously issued invoices by LM Investment Management Ltd (Administrators Appointed) 1106, 1108, 1109, 1118"; and
 - (ii) which, contrary to the facts as further particularised in sub-paragraph (e) hereof, identified a credit of \$509,747.84 (excluding GST) for "income received in advance by LMA from LM FMIF prior to appointment of Voluntary Administrators on 19 March 2013", and an amount outstanding of \$224,740.07 (including GST).
- (d) LMIM issued invoice 8973Inv004 to PTAL dated 30 June 2013 for "Loan Management Fees June 2013" for an amount inclusive of GST of \$214,426.40.
- (e) Further to sub-paragraphs (a) to (d) hereof, the amounts referred to in sub-paragraph (a) were paid by:
- (i) on 31 March 2013, reducing the balance of the LMA Account in the amount of \$230,949.04, in payment of the said invoice 1106; and
 - (ii) making cash payments in the aggregate amount of \$768,940.06, as follows:
 - (A) on about 26 April 2013, in the amount of \$149,829.65, in payment of the said invoice 1108; and
 - (B) on about 9 May 2013, the sum of \$128,242.79, in payment of the said invoice 1109;
 - (C) on about 14 June 2013, the sum of \$276,441.22, in payment of the said invoice 1118, or alternatively the balance of the said invoice 8973Inv003; and
 - (D) on about 8 July 2013, the sum of \$214,426.40, in payment of the said invoice 8973Inv004.

Signed:


Tucker & Cowen

Description: Solicitors for the Plaintiff

These particulars were settled by Mr Ananian-Cooper of Counsel.