

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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 MANAGER 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

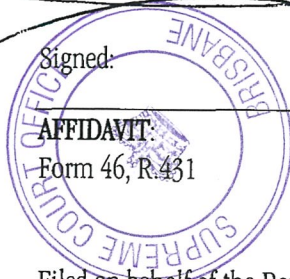
AFFIDAVIT OF DAVID WHYTE

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Signed:



Filed on behalf of the Respondent
Mr David Whyte

Witnessed by:

TUCKER & COWEN
Solicitors
Level 15, 15 Adelaide Street
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I, **DAVID WHYTE** of c/- BDO, Level 10, 12 Creek Street, Brisbane, in the State of Queensland, Registered liquidator, state on oath:-

1. I am a Registered liquidator and partner of the firm BDO.
2. For the last five years, I have been the person appointed to be responsible for ensuring the winding up of the managed investment scheme known as the LM First Mortgage Income Fund (**FMIF**) (formerly known, until 30 May 2007, as the "LM Mortgage Income Fund") in accordance with its Constitution, and the receiver of its property.
3. As a result of this work, I am very familiar with the business of the FMIF and all of its books and records.
4. More generally, I have been a partner at BDO since 2008 and prior to that a partner at PPB from 2006. I have over 17 years' experience in insolvency, plus a further 22 years' experience in banking, including 10 years' experience in corporate turnaround and restructuring. Through the course of my career, I have carried out about 200 appointments as a receiver and manager, administrator or liquidator, including Court appointments.
5. At pages 1 to 3 of the Bundle (as defined in paragraph 8 below) is a copy of my profile from the BDO website, which summarises my experience.
6. My experience includes being appointed by Justice Applegarth to ensure the winding up of Equititrust Income Fund ("**EIF**"), pursuant to s 601NF(1) of the Corporations Act 2001 ("**the Act**") and as receiver of the property of the EIF: see *Re Equititrust Ltd* [2011] QSC 353.
7. The EIF is a registered managed investment scheme that is similar to the FMIF in many respects, including that it advanced funds to borrowers on the security of first registered mortgages. In this winding up, which commenced in 2011, I have paid three interim distributions to investors to date giving the investors a return of 10.6 cents in the dollar.
8. Now produced and shown to me and marked "**DW-126**" is an indexed, paginated bundle of the documents referred to in this Affidavit ("**the Bundle**").

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A. INTRODUCTORY MATTERS

FMIF Background

9. The FMIF was registered as a managed investment scheme on 28 September 1999.
10. The FMIF is governed by a Constitution, which has been amended at various times since the registration of the FMIF as a managed investment scheme. The current Constitution of the FMIF is the "Replacement Constitution" dated 11 April 2008, as amended by supplemental deeds dated 16 May 2012 and 26 October 2012 ("the **Constitution**"). At pages 4 to 67 of the Bundle is a copy of the Constitution of the FMIF.
11. The members of the FMIF subscribed capital for investment purposes. The FMIF's investment activities consisted of advancing funds to borrowers under loan agreements on the security of (mainly) first registered mortgages. The assets of the FMIF primarily consisted of its rights against borrowers under these loan agreements and mortgages.
12. LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("**LMIM**"), the Second Applicant, is the responsible entity ("**RE**") of the FMIF, and has been since the FMIF's inception.
13. The property of the FMIF is held by a custodian, The Trust Company (PTAL) Limited (**PTAL**) (formerly known as Permanent Trustee Australia Limited), pursuant to a Custody Agreement dated 4 February 1999, as amended from time to time. At pages 68 to 113 of the Bundle is a copy of that Custody Agreement, together with amendments to the Custody Agreement, dated 14 June 1999 and 1 September 2004 respectively.
14. The Custody Agreement has also been amended at other times by including additional Schemes (on 20 May 1999, 24 May 2000, 18 March 2002, 19 November 2002 and 27 September 2006), and PTAL resigned as custodian of certain Schemes (not including the FMIF) on 9 April 2008, but I have not exhibited the documents by which those amendments were effected due to the volume of documentation, and because those amendments are not, in my view, relevant for the purposes of the Applicants' application presently before this Honourable Court.

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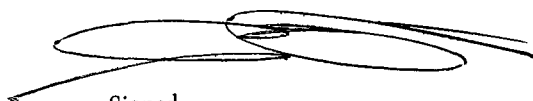
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15. For many years (I understand from at least 2003), LM Administration Pty Ltd ACN 055 691 426 (“**LMA**”), as trustee for the LMA Trust, was a service company providing services for LMIM’s funds management operations under a series of services agreements.
16. LMIM was also the responsible entity or trustee of a number of other funds.
17. Those included three ‘Feeder Funds’, whose assets were predominately units in the FMIF. They are the funds known as the LM Currency Protected Australian Income Fund (**CPAIF**), the LM Institutional Currency Protected Australian Income Fund (**ICPAIF**), and the LM Wholesale First Mortgage Income Fund (**WFMIF**).
18. In addition, LMIM was also trustee of the LM Managed Performance Fund (**MPF**) and responsible entity of the LM Australian Income Fund (**AIF**), the Australian Structured Products Fund (**ASPF**) and the LM Currency Protected Fund (**CPF**). The assets of each fund are held separately.
19. The existence of these diverse structures has resulted in assets being centred in the various different funds, which were all centrally managed and controlled by LMIM through its service company, LMA.
20. One of the difficult issues in the winding up of the FMIF has been questionable transactions and dealings between the various funds controlled by LMIM.
21. The FMIF started to face difficulties around the time of the Global Financial Crisis, which eventually led to the FMIF being closed for new investments on or about March 2009, and the suspension of redemptions shortly thereafter in about May 2009.
22. On or about 16 November 2012, Trilogy Funds Management Limited (**Trilogy**) replaced LMIM as the responsible entity of the WFMIF.
23. On 19 March 2013, John Park and Ginette Muller were appointed voluntary administrators of each of LMIM and LMA. However, LMA continued to provide services to LMIM (in its own capacity and in its role as RE or trustee) under a Resources Agreement executed by the administrators on or about 21 March 2013.

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24. On 12 April 2013, de Jersey CJ ordered in proceeding 2869/13 that LMIM be replaced as the trustee of the MPF by KordaMentha Pty Ltd and Calibre Capital Ltd. Calibre Capital Ltd has since resigned as a trustee of the MPF, and KordaMentha Pty Ltd is now the sole trustee of the MPF.
25. On 11 July 2013, Deutsche Bank AG (“DB”), a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol (“the DB Receivers”) as receivers and managers of the assets and undertaking of the FMIF.
26. On 26 July 2013, LMA was placed into liquidation, and David Clout and Lorraine Smith were appointed as its liquidators. Ms Smith has subsequently retired from her role, and Mr Clout is now the sole liquidator of LMA.
27. On 1 August 2013, Mr Park and Ms Muller were appointed liquidators of LMIM (the **Liquidators**). Mr Park has remained a liquidator of LMIM, although I note that Ms Muller retired from the role on 17 May 2017.

My appointment and roles

28. I was appointed in proceeding 3383/13 on 8 August 2013.
29. Those proceedings were commenced by Trilogy on 2 May 2013, seeking orders that it be appointed as temporary responsible entity of the FMIF.
30. Two further applications were then made in those proceedings, by the Australian Securities and Investments Commission (**ASIC**), and by one unitholder, Mr Roger Shotton (**Mr Shotton**).
31. Both ASIC and Mr Shotton sought orders that a person be appointed under section 601NF(1) to be responsible for ensuring that the FMIF was wound up in accordance with its Constitution. ASIC also sought orders that the person so appointed also be appointed as receivers of the property of the FMIF, and Mr Shotton joined ASIC in seeking those orders.
32. ASIC and Mr Shotton argued that it was necessary for someone to be appointed because of concerns about the conduct of the Liquidators.

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33. My appointment was proposed by Mr Shotton, and ASIC proposed other insolvency practitioners for the role.
34. In summary, her Honour found that there were potential conflicts of interest that might arise in the liquidation of LMIM and the winding up of the FMIF because of the various different capacities in which LMIM had acted.
35. Her Honour considered that potential in conjunction with findings about the conduct of the Liquidators justified the appointment of someone under section 601NF(1) as 'necessary'.
36. At 114 to 145 of the Bundle is a copy of Her Honour Justice Dalton's reasons for judgment.
37. The terms of my appointment were articulated in the Order of the Honourable Justice Dalton dated 21 August 2013.
38. The terms of my appointment are set out in those orders, as well as the orders made in this proceeding by the Honourable Justice Jackson dated 17 December 2015 (the **December 2015 Orders**), as varied by orders dated 18 July 2018. At pages 146 to 158 of the Bundle is a copy of these three orders.
39. The Liquidators appealed to the Court of Appeal against the Orders of Dalton J appointing me. Although some of the factual findings made by Dalton J were overturned, a number of key findings were not, and consequently the Court of Appeal dismissed the appeal. At 159 to 205 of the Bundle is a copy of the Court of Appeal's reasons for judgment.
40. As at the date of this affidavit, the assets of the FMIF are held by PTAL as custodian of the FMIF. PTAL acts on written instructions approved by both the DB Receiver and their appointor. In the case of my expenses (or other payments at my request), PTAL also requires my approval.

My Strategy

41. My overall strategy in relation to the winding up of the FMIF has been and remains to resolve the main issues in the winding up, as soon as is reasonably possible.

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42. It is difficult to predict how long that will take, however there is a prospect of the winding up being resolved in six to twelve months, if the various litigation matters can be settled or resolved in that time.

43. The winding up of the FMIF has to date been a substantial endeavour. That has been for a number of reasons, including (in summary):

(a) the number and variety of assets of the FMIF that had to be realised. The assets included seven retirement villages, located in different States, involving a number of uncompleted construction projects. The work involved not only management of the sale of the retirement villages, but managing their day to day operations until such time as they could be sold, within a heavily regulated environment.

(b) the volume of the books and records of the FMIF with which I had to become familiar. The FMIF records were stored on the 'LM Servers', hosted by LMA at the time of my appointment; those FMIF records were intermingled with the books and records of LMIM (including those of the various funds of which LMIM was or had been trustee or RE) and LMA, which altogether comprised approximately 12 TB (that is, 12 Terabytes, or over 12,000 Gigabytes) of electronic records and several hundred boxes of hard copy records.

To assist me in that endeavour, I continued to engage LMA for a period of time (during which LMA retained the 'LMIM Servers'), to provide services and assistance to me (in my role pursuant to my appointment in respect of the FMIF) to interrogate the servers and other books and records as necessary, to obtain relevant information and records; the other Funds similarly obtained services and assistance from LMA for similar purposes during that time..

(c) the central role of LMIM and LMA in the management of all of the Funds they were managing. That had a number of consequences including a number of questionable transactions by LMIM with itself in its different capacities, and a lack of proper documentation of various aspects of the management of the Funds, as a result of which

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the various claims involving the Funds were attended by significant legal and factual complexity.

(d) in circumstances where none of the funds managed by LMIM would give a full return on investment to their members, the existence of these questionable transactions has given rise to a number of claims between the various funds that have had to be investigated and, if necessary, resolved. This is important because it will determine on which persons the losses resulting from such transactions will fall.

(e) the need to liaise with a number of other appointees, including the DB Receivers, the liquidators of LMIM, Mr Clout as the liquidator of LMA, Mr Jahani as the Receiver of the CPAIF and ICPAIF, Trilogy as the current RE of the WMIF, and the MPF Trustee.

In the course of this work, however, I have developed a productive working relationship with most of them, in particular the DB Receivers, Mr Clout, Mr Jahani and the representatives of Trilogy.

(f) the need to communicate with and report to the members of the FMIF, both in Australia and internationally, as to the progress of the winding up.

44. As at the date of this affidavit, all of the assets of the FMIF have been realised, save for a number of as yet unresolved litigation claims.

45. At pages 206 to 207 of the Bundle is a schedule summarising the realisations of retirement villages or real property undertaken by me or the DB Receivers in the winding up of the FMIF and the proceeds of sale thereof prepared by BDO staff. The proceeds of \$72,287,703.97 received by the FMIF from the sales by BDO noted in this schedule includes not only the proceeds of sale of the retirement villages, but also, incoming contributions received when managing the villages from the sale of empty units to new residents.

46. The unresolved litigation claims are defined below as the “**Auditors’ Claim**”, “the **Bellpac Proceeding**”, “the **Clear Accounts Proceeding**”, “the **Feeder Fund Proceedings**”, “the **Bellpac**

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Bond Proceeding”, the Claim against the Bankrupt Estate of Ross Lamb, and the Claim against David Coulter.

47. It is my intention to resolve the various legal proceedings by settlement at mediation or otherwise, provided that a reasonable settlement is possible, i.e. one that is reflective of the strengths and weaknesses of the claim in question, as well as the interests of the members of the FMIF in an expeditious resolution.
48. Substantial progress has recently made towards this goal. In particular:
- (a) the substantial claims made by KordaMentha as trustee of the MPF (“**MPF Trustee**”) against assets of the FMIF were discontinued earlier this year (defined below as the Lifestyle and KPG Proceeding and the AIIS Proceeding);
 - (b) the Feeder Fund Proceedings has recently settled at mediation (subject to finalisation of a deed); and
 - (c) the EY Proceedings will be mediated on 4 and 5 March 2019.
49. I will explain the current status of the various legal proceedings below, in more detail.

Regime Proposed by Mr Park

50. I have seen and read the Affidavit of John Park (“**the Liquidator**” or “**Mr Park**”) sworn and filed in this proceeding on 12 November 2018 (“**Mr Park’s Affidavit**”), in support of the application filed 10 October 2018 (“**the Application**”) for directions in relation to the dual appointments of Mr Park and myself to wind up the FMIF.
51. I have also seen and read the Affidavit of Kelly-Anne Lavina Trenfield sworn and filed in this proceeding on 28 November 2018 (“**Ms Trenfield’s Affidavit**”), in support of the Application.
52. By way of brief summary, I do not consider that the orders sought by Mr Park are in the best interests of members of the FMIF, for the following key reasons (which I will explain in greater detail below):

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- (a) The basis for Mr Park's proposal is a willingness of BDO to proceed on an unorthodox basis, namely that 50% of my remuneration and expenses be deferred to the end of the winding up.

Having consulted with my partners, I am not willing to consent to an appointment on this basis. Specifically, I am not in a position with my partners to be able to fund 50% of the expense of the winding up until its conclusion, nor would my partners in BDO be prepared to provide the use of BDO staff I have been utilising in the course of my appointment, to me on the basis that half of the (potentially substantial) remuneration for my work, and for the work of those staff, is deferred until the end of the winding up of the FMIF, in circumstances where that end date is presently uncertain and depends upon a number of factors, many of which could be outside my control.

- (b) The bulk of the work remaining in the winding up of the FMIF is resolving the litigation matters, with the non-litigation work now being relatively insignificant by comparison.
- (c) The orders sought in the Application, if made, will not in my opinion save costs for FMIF members, but rather, increase costs.

This is because my staff and I, by reason of having undertaken most of the considerable and complicated work in the winding up of the FMIF to date, have a detailed knowledge regarding the affairs and books and records of, the FMIF.

If responsibility for ensuring that the FMIF is wound up in accordance with its Constitution is transferred to Mr Park, then I believe that there will be significant additional costs in the transition, and with Mr Park and his staff getting "up to speed";

- (d) There are, in my opinion, conflicts of interest or duty that still exist in the winding up of the FMIF.


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One example of this is my role in responding to applications by the Liquidator to recover expenses and remuneration from the property of the FMIF, which I would no longer perform.

Another is the conflict between the role of Mr Park under the 17 December 2015 Orders, of adjudicating upon proofs of debt in the liquidation of LMIM and notifying me of claims for indemnity from the FMIF, and my role of adjudicating upon those claims for indemnity from the FMIF.

- (e) The orders sought in the Application, if made, will not end the dual appointments of Mr Park and me to wind up the FMIF, rather they would only transfer certain responsibilities to Mr Park.

Attitude of Key Stakeholders

53. I understand that the key stakeholders to this Application are as follows:

- (a) the members of the FMIF;
- (b) ASIC, as the corporate regulator who sought the appointment of a person under section 601NF(1) of the Act with the powers of a receiver;
- (c) LMIM as the responsible entity of the FMIF, and its liquidator, MrPark.

54. The FMIF presently has a total of 4559 members.

55. The membership comprises a large number of individual investors, and three 'Feeder Funds'.

56. The CPAIF holds about 25% of the total issued units in the FMIF; the ICPAIF holds just under 2%, and the WFMIF holds about 20%.

57. The responsible entity of the CPAIF and the ICPAIF is also LMIM, however Mr Said Jahani of Grant Thornton has been appointed by a secured creditor as the receiver and manager of all of their respective assets and undertakings.

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58. The responsible entity of the WFMIF is Trilogy Funds Management Limited (**Trilogy**).
59. I have instructed my solicitors (Tucker & Cowen) to write to the solicitors of both Mr Jahani (HWL Ebsworth) and Trilogy (Squire Patton Boggs) regarding their attitude to this Application. A copy of that correspondence, which has been provided to me, is at pages 208 to 211 of the Bundle.
60. I am not as yet aware of their position.
61. However, for reasons explained further below, I have been keeping the members of the FMIF regularly informed of the progress of my receivership.
62. In the five years since my appointment, with one exception, to the best of my recollection, I am not aware of anyone expressing a concern regarding the structure of the current arrangements with regard to the timing of payment of my remuneration and expenses (that is, my remuneration is approved from time to time by way of application to the Court and my proper expenses are paid during the course of the winding up), apart from Mr Park.
63. The exception is a member who appeared at an application for my remuneration before Justice Boddice on 7 June 2018, and sought a regime for the deferral of my remuneration because “there is little incentive for [the various legal proceedings] to be resolved in a timely way if the receiver continues to be able to be paid remuneration without any timeline being required in respect of the completion of those proceedings.”
64. His Honour did not consider it appropriate for such a regime to be imposed at that time and declined to make that order.
65. However, after Court, and after discussing the matter in more detail with the unitholder in question and responding to his queries, he said words to me to the effect of “keep up the good work”.

ASIC's position

66. I am informed by my solicitor, Mr David Schwarz of Tucker & Cowen, and believe, that on 16 November 2018, he received correspondence from Mr Hugh Copley of ASIC, in which Mr Copley:

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- (a) indicated that ASIC “does not wish – unless required by the Court – to take a formal role in the Application. These instructions are motivated by the finite resources at ASIC’s disposal and by ASIC’s desire (consistent with ASIC’s position taken in the Dalton proceeding and subsequent appeal) not to further erode the likely return to the unitholders of the FMIF ...”;
- (b) states that “ASIC is anxious to understand what, if any, assistance it might be able to provide to the Court on the Application”;
- (c) seeks Russells’ response to two specific matters regarding the orders sought in the Application, and the basis upon which they seek to revisit the existing arrangements.

- 67. A copy of that correspondence, which has been provided to me, is at pages 212 to 213 of the Bundle.
- 68. On 16 November 2018, Russells wrote to ASIC (copied to my solicitors, Tucker & Cowen) to provide its response to ASIC’s queries. At pages 214 to 215 of the Bundle is a copy of that correspondence. In that correspondence, it is stated (without any qualification) that Mr Park is “*prepared to wind up that fund (the FMIF) for a fixed fee*”.
- 69. On 26 November 2018, Tucker & Cowen sent a letter to Russells (copied to ASIC) pointing out that the effect of the Orders sought in paragraph 2(e) of the Application, if made, would not limit Mr Park to a fixed fee. At page 216 of the Bundle is a copy of that correspondence.
- 70. On 30 November 2018, Russells sent a letter to Tucker & Cowen (that was not copied to ASIC) stating *inter alia* that, if the budgeted amounts were exceeded, that would be an issue for the Court to consider at the remuneration and expenses determination at the end of the winding up. At pages 217 to 218 of a Bundle is a copy of that correspondence.

Adequacy of existing arrangements

- 71. In light of the present Application, I have given further consideration to what could be done to progress the finalisation of the winding up of the FMIF as efficiently as possible.

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72. *First*, I have formed the view that it was desirable for a single Judge to be appointed to consider all of my future applications for judicial advice, and approval of remuneration.
73. At the Review of the Application on 19 November 2018, my counsel informed the Court that it was my intention to approach the Court to request that a single Judge be allocated to consider all my future applications for judicial advice, and approval of remuneration.
74. On 23 November 2018, my solicitors sent correspondence to the Associate to the Senior Judge Administrator inquiring as to whether an administrative arrangement could be put in place along those lines. At pages 219 to 232 of the Bundle is a copy of that letter.
75. On 26 November 2018, my solicitors received a response from the Associate of the Senior Judge Administrator to the effect that Justice Mullins would hear future applications relating to the FMIF, other than in relation to the proceedings being managed by Justice Jackson. At pages 233 to 235 of the Bundle is a copy of that response.
76. *Second*, in the longer term, in my view it may be desirable for me to be given authority to conduct the final audit of the FMIF, and to make any interim and final distributions.
77. As I explain in more detail below, I think that I am in the best position to do that work, having supervised the preparation of the unaudited financial statements for each six month period to date (since my appointment), with assistance from BDO's Audit team, and having maintained the register of the members of the FMIF to date.

B. CURRENT STATUS OF WINDING UP, WORK REMAINING AND ESTIMATES

78. I explain below the relevant background of the FMIF, and the work done in the winding up of the FMIF to date.
79. I then address in detail the nature of the work that remains to be done, to finalise the winding up of the FMIF.

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Outline of Key achievements and milestones in winding up of FMIF to date

80. At the time of my appointment, the FMIF had cash at bank of about \$9 million. It owed approximately \$25 million to DB, a secured creditor of the FMIF.
81. Most of the substantive tasks in the winding up of the FMIF have been performed by me and BDO staff under my supervision. In this regard:
- (a) all realisations of retirement village assets, which represented approximately 50% of the FMIF's loan book at the time of my appointment, were undertaken by me. The less complicated property realisations were undertaken by the DB Receivers, having been identified as those that could be realised the fastest in order to pay out the secured creditor;
 - (b) I have been responsible for bringing, defending and maintaining any proceedings on behalf of the FMIF in the name of LMIM as is necessary for the winding up of the FMIF;
 - (c) I have had the carriage or prosecution of various claims or the defence of claims made against assets of the FMIF;
 - (d) the bank accounts of the FMIF (which are in PTAL's name as custodian) have been controlled by the DB Receivers;
 - (e) the DB Receivers have reported the receipts and payments of the FMIF to ASIC;
 - (f) I have sent updates and reported to members, including complying with the conditions of relief granted by ASIC with respect to the FMIF's financial reporting and audit obligations;
 - (g) I have maintained and updated the Register of members of the FMIF, and have the principal responsibility for responding to queries from members.


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82. As a result of realisations of the property of the FMIF, DB was paid out in early January 2014. The DB Receivers have not yet retired, due to claims made or foreshadowed against the FMIF by the MPF Trustee, but they are expected to retire shortly. I address this further, below.
83. All of the real property security assets of the FMIF have now been realised. That included retirement village assets located in different states. The net proceeds of sale from five of the retirement village assets was approximately \$40 million, which was about \$10 million above the amount of professional valuations of those assets obtained by BDO prior to the sales.
84. There have been a number of other recoveries in the winding up of the FMIF to date as a result of work undertaken by BDO, including:
- (a) a recovery of \$7.5 million from a borrower that owned two retirement villages to whom the FMIF had advanced funds, as a result of negotiations undertaken by BDO; and
 - (b) a recovery of \$3 million from proceedings successfully conducted by BDO against a quantity surveyor for an FMIF loan, alleging professional negligence in respect of certifying works on a completed development.
85. A number of substantial claims made by the MPF Trustee against assets of the FMIF have also been discontinued earlier this year, as a result of work undertaken by BDO, namely:
- (a) the KPG and Lifestyle Proceedings, which sought approximately \$24 million plus interest and costs from assets of the FMIF; and
 - (b) the AIFS Proceeding in which approximately \$3.9 million plus interest and costs was sought from assets of the FMIF.
86. In the Feeder Fund Proceeding, I caused LMIM as RE of the FMIF to seek relief to the effect that approximately \$55 million is to be withheld from future distributions to the Feeder Funds, on various bases.

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87. A mediation of the Feeder Fund Proceeding was held on 5 and 6 November 2018. A confidential settlement of that proceeding, subject to a deed, has been reached as between all parties, save for LMIM in its own right. The claims against LMIM in its own right are maintained alongside the Clear Accounts Proceeding, in the event that it is necessary to rely on the them for the purpose of defeating future indemnity claims against the FMIF.
88. There remain a number of other proceedings on foot in which I have caused LMIM as RE of the FMIF to claim substantial sums for the benefit of FMIF members, including the Auditor's Claim, in which approximately \$200 million is claimed against the former auditors of the FMIF, and the Bellpac Proceeding.

DB Receivers

89. Since my appointment, I have worked co-operatively with the DB Receivers. We have split up tasks as between ourselves, to avoid overlap and minimise costs for FMIF members.
90. The DB Receivers have also provided an additional layer of oversight in terms of approval of expenses. The practice has been for invoices for my expenses to be submitted to the DB Receivers, the DB Receivers review the invoices and then, if there are no issues, cause PTAL to effect payment from the FMIF.
91. I have been in ongoing discussions and correspondence with the DB Receivers in relation to their proposed retirement by way of discussions or correspondence.
92. The DB Receivers adopted the position that they are not in the position to retire until a release is provided by the MPF Trustee of claims against DB and the DB Receivers.
93. Following the discontinuance of the claims brought by the MPF Trustee earlier this year, I followed up the DB Receivers regarding their retirement, on numerous occasions.
94. On 20 September 2018, Mr Jonathan Henry of McGrath Nicol, on behalf of the DB Receivers, informed me by email that they would retire within 7 days. At pages 236 to 237 of the Bundle is a copy of this correspondence.


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95. On 3 October 2018, Clayton Utz, the solicitors for the DB Receivers, sent an email to Tucker & Cowen advising that the DB Receivers would seek a release from the MPF Trustee within seven days, and if so they would immediately retire or advise what steps they propose to take to facilitate that retirement. At pages 238 to 241 of the Bundle is a copy of that correspondence.
96. On 16 October 2018, I instructed my solicitors, Tucker & Cowen, to write to the solicitors for the Liquidator, to inform them that I had no objection to the Liquidator making an application (as part of this Application) to remove the DB Receivers. At page 242 of the Bundle is a copy of that correspondence.
97. On 17 October 2018, Minter Ellison, the solicitors for the MPF Trustee, wrote to Clayton Utz to inform them that the MPF Trustee declined to provide the requested release. At page 243 of the Bundle is a copy of that letter.
98. I have had ongoing communications with the DB Receivers, and as a result of those communications, I remain hopeful that they will retire shortly.
99. On 30 November 2018, Tucker & Cowen received a response from Russells to their correspondence dated 16 October 2018, which is referred to in paragraph 70 of this Affidavit and is at pages 217 to 218 of the Bundle.

Work Remaining to Finalise the Winding up

100. The most complex tasks which remain to be done in the winding up of the FMIF are:
- (a) Progressing litigation which I have caused to be brought in the name of LMIM as responsible entity of the FMIF, or have otherwise caused to be funded for the benefit of the FMIF; and
 - (b) Completing the proof of debt and indemnity claim process, pursuant to the December 2015 Orders.
101. Apart from these, the other tasks are relatively straight forward, subject to some qualifications which I address below. The tasks are as follows:

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- (a) Maintaining LMIM's Australian Financial Services Licence (AFSL).
- (b) Complying with financial reporting and audit obligations, and seeking the extension of the current ASIC exemptions obtained on my application, should the current exemptions expire before the winding up is at the stage where the final audit should be undertaken.
- (c) Maintaining the Register of members of the FMIF.
- (d) Reporting quarterly to members.
- (e) Dealing with any claims by Mr Park for remuneration, costs or expenses to be paid from the FMIF.
- (f) Distributing funds to the members of the FMIF;
- (g) Taking such further steps as are necessary to bring the winding up of the FMIF and my appointments to an end, including dealing with ASIC for the deregistration of the Fund.

102. More specifically, I envisage that the steps to the finalisation of the winding up will be as follows, in the following order:

- (a) *First*, the claims against the FMIF must be identified, by the process envisaged by the December 2015 Orders, with Mr Park in the first instance identifying any Creditor Indemnity Claims against the FMIF;
- (b) *Second*, I intend to bring an application for authority to make a substantial interim distribution to the members of the FMIF, retaining sufficient funds to conclude the winding up of the FMIF (including litigation matters), and to meet any Creditor Indemnity Claims that have yet to be finalised.

That application will likely include an application to the Court for orders or directions to address issues relating to the membership records of the FMIF in relation to foreign investors, which I explain below in more detail.

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- (c) *Third*, I intend to seek to resolve the litigation matters as expeditiously as possible, in the best interests of the members of the FMIF. Insofar as it is appropriate and I am authorised to do so, I intend to make further interim distributions of funds to the members of the FMIF;
- (d) *Fourth*, if I am authorised to do so, I intend to take the steps necessary to finalise the winding up of the FMIF, including the final audit of the accounts of the winding up, a final distribution, and dealing with ASIC for deregistration under section 601PB of the Act.

103. While those steps are being completed, the various administrative tasks of the winding up, set out above, would be continued.
104. I explain the more straightforward tasks immediately below in more detail, following which I explain the status of the various litigation matters.

LMIM's AFSL

105. The maintenance of LMIM's AFSL is the responsibility of the liquidators.
106. Under the *Corporations Act 2001*, LMIM is required to hold an AFSL to enable it to act as responsible entity of the FMIF.
107. On 9 April 2013, ASIC suspended the AFSL of LMIM until 9 April 2015, and has since issued further suspensions of LMIM's AFSL, most recently, until 31 March 2020.
108. Importantly, each of those suspensions specifically provide that the licence continues in effect as though the suspension had not happened for the purpose of the provisions of Chapters 5C and 7 (except 7.2, 7.3, 7.4 and 7.5) of the Act, regarding various matters including the winding up of the FMIF.
109. At page 244 of the Bundle is a copy of the most recent notice suspending LMIM's AFSL, extending the suspension to 31 March 2020.

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110. There is minimal work required for the Liquidator to maintain LMIM's AFSL, if it is necessary to apply to extend it again.

Applications to ASIC for financial reporting and audit relief

111. Under the December 2015 Orders, I was directed to apply on behalf of the FMIF to ASIC for relief from compliance with financial reporting and audit obligations in Part 2M.3 and s 601HG of the Corporations Act.
112. On 29 April 2016, I made such an application, and on 29 September 2016, the Australian Securities and Investments Commission ("ASIC") issued ASIC Instrument 16-0959, granting the FMIF a deferral of its obligations to comply with the relevant financial reporting and audit obligations until 16 May 2018, subject to compliance with the conditions of the relief.
113. On 8 December 2017, I applied to further extend this relief, and on 15 March 2018, ASIC issued ASIC Instrument 18-0166, extending the said deferral of financial reporting and audit obligations to 16 March 2020. At pages 245 to 246 of the Bundle is a copy of ASIC Instrument 16-0959.
114. The ASIC relief only applies to LMIM as RE of the FMIF where "the Responsible Person" appointed under section 601NF(1) does or causes to be done certain things. As such, I understand the relief to be specific to the circumstances of my appointment, and I am unsure whether it would continue to apply if my appointment were ended.
115. I note that a report from Mr Park relating to the LM Australian Income Fund dated 19 September 2018 that is at pages 52 to 54 of exhibit "JRP-10" to Mr Park's Affidavit says that ASIC refused him similar relief in relation to that Fund.
116. I am not aware of the reasons for ASIC's refusal, however if ASIC were to refuse such relief to Mr Park in relation to the FMIF, that would result in considerable additional cost to the FMIF.
117. There have been considerable costs savings to FMIF members as a result of the financial reporting and audit relief I sought and obtained from ASIC. Relevantly:

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- (a) The last audit of the FMIF, carried out by Ernst & Young for the 2012 financial year, cost in excess of \$500,000 to perform.
 - (b) I am informed by Mr Craig Jenkins, a BDO audit partner, who audits several managed investment schemes and who has assisted me from time to time on matters related to the winding up of the FMIF, and believe, that the auditor's fees for an audit would be between \$20,000 and \$50,000 for each financial year, up to about December 2015. The auditor's fees for each half yearly audit review required by section 302 of the Act is estimated to be between 50% and 70% of the cost of an annual audit, up to about December 2015.
 - (c) Mr Jenkins estimates that, from about December 2015, an auditor's fees would be about \$12,500 to \$20,000 for each yearly audit, and between 50% and 70% of that for each half yearly audit.
 - (d) Mr Jenkins estimates, however, that an auditor's fees for undertaking only one audit at the completion of the winding up (which would cover the entire period of the winding up) as required under the FMIF's Constitution would be about \$60,000.
118. These figures do not include insolvency practitioner's fees to instruct auditors and provide documents or explanations to auditors, or the costs of complying with other aspects of the financial reporting and audit obligations.
119. There are therefore significant costs savings, in auditor's fees alone, if only one audit is undertaken at the completion of the winding up.
120. Under the December 2015 Orders, in the absence of any relief from ASIC, responsibility for complying with the financial reporting and audit obligations lies with LMIM and its Liquidator.
121. However, in my opinion, in all the circumstances there would be considerable costs savings to members of the FMIF if I was responsible for compliance with these obligations, once they become due.


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122. That is because my staff and I have a detailed knowledge of the books and records and affairs of the FMIF, as a result of conducting all or almost all of the substantive aspects of the winding up, and preparing unaudited Financial Statements for the FMIF every six months.
123. There would be considerable additional costs associated with Mr Park and his staff familiarising themselves with the relevant books and records and affairs of the FMIF.
124. I estimate that BDO's remuneration and expenses to prepare the management accounts of the FMIF in accordance with accounting policies and for BDO's audit team to review same would be about \$15,000 to \$20,000 excluding GST for each six month period.

Financial Reporting to FMIF members

125. I provide detailed periodic financial reporting to the members of the FMIF.
126. *First*, I cause (unaudited) half yearly and end-of-year financial statements for the FMIF to be prepared and uploaded to the website www.lmfmif.com (the **FMIF Website**).
127. At pages 247 to 272 of the Bundle is a copy of the most recent end-of-year unaudited financial statements for the year ended 30 June 2018.
128. *Second*, I cause quarterly reports of my receivership to be issued to members. My last ten reports to investors are exhibited to Mr Park's Affidavit from pages 90 to 373 of exhibit "JRP-10".
129. Every second report must comply with the conditions of the relief granted by ASIC to the FMIF in relation to its financial reporting and audit obligations.
130. Specifically, in my reports to members, I update members as to the amount of remuneration incurred, since my previous application for approval of remuneration.
131. I estimate that BDO's remuneration and expenses for preparing each such quarterly report will be between \$5,000 to \$10,000 excluding GST per quarter.
132. *Third*, the DB Receivers control the bank accounts of the FMIF, and prepare and lodge with ASIC statements of receipts and payments (ASIC Form 524's).

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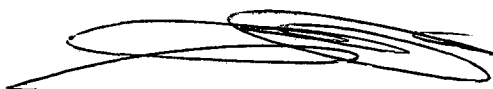
Witnessed by:

133. Details of all of the receipts and payments of the FMIF, including of the costs and expenses of the winding up, are detailed in these statements, which I cause to be uploaded to the FMIF Website.
134. *Fourth*, I also lodge statements of receipts and payments but, as I do not control the FMIF bank accounts, my statements of receipts and payments only contain limited information in relation to my remuneration and disbursements.
135. *Fifth*, I bring periodic applications to Court for approval of my remuneration, in the proceedings in which I was appointed.
136. In support of each such application, I provide detailed evidence to the Court of the work for which I seek approval of my remuneration.

Register of Members of FMIF

137. Under the December 2015 Orders, I am responsible for maintaining the Register of Members of the FMIF.
138. The work performed by BDO staff under my supervision includes updating investor details, reviewing and processing requests to transfer units as requested or directed by beneficiaries, trustees or executors of deceased estates of members or their solicitors, and generating reports to attend to members unit balance inquiries.
139. Investigations undertaken by BDO have also identified that the number of units held by investors who invested in foreign currencies (i.e. the Class C members) appears to be incorrectly recorded in the membership records of the FMIF.
140. When LMIM transferred the member records of the FMIF to a new database in 2010 (a number of years prior to my appointment), the number of units of investors who invested in a foreign currency was recorded in the new database, by allocating to the investors concerned one unit in the FMIF for each unit of foreign currency invested, rather than one unit in the FMIF for each \$1AUD invested, after the foreign currency amount invested had been converted to AUD at the applicable exchange rate.

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141. My staff and I have been undertaking work in order to address this issue, and I expect to be in a position to apply to Court for orders or directions to address this issue shortly.
142. My estimate of the future costs and expenses of BDO performing the work necessary to address the issues relating to the membership records of foreign investors is included in the estimate provided at paragraph 163.

Proof of debt process and regime under Residual Powers Orders

143. The winding up of the FMIF requires the identification of indemnity claims against the FMIF.
144. The process by which such claims are to be identified is one of the subjects of the December 2015 Orders.
145. Under that regime, I am dependent on Mr Park to adjudicate the proofs of debt, and to identify and notify me of indemnity claims.
146. I understand that Mr Park called for lodgement of proofs of debt in early September 2018, with a due date of 2 October 2018 for proofs to be lodged. My evidence about the time taken by Mr Park in calling for proofs is set out further below in this affidavit.
147. Following the due date for lodgement, I instructed my solicitors, Tucker & Cowen, to send correspondence dated 15 November 2018 to Mr Park's solicitors, Russells, regarding his adjudication of the claims that had been lodged, as well as other issues. A copy of that correspondence is set out at pages 273 to 275 of the Bundle.
148. On 16 November 2018, my solicitors received a response from Mr Park's solicitors, regarding this issue, as well as other issues. A copy of that correspondence is set out at pages 276 to 277 of the Bundle.
149. On 26 November 2018, I instructed my solicitors to send further correspondence to Mr Park's solicitors regarding the time taken by Mr Park in adjudicating the proofs of debt, the necessary precursor to identify and notifying me of indemnity claims under the December 2015 Orders. A copy of that correspondence is set out at pages 278 to 281 of the Bundle.

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Witnessed by:



150. The time taken by Mr Park has been and is of particular concern to me given that completion of the proof of debt process under the December 2015 Orders is now the critical step that must be completed to enable me to apply to Court for authorisation to make an interim distribution to FMIF investors.
151. I am informed by my solicitors that they received a response to their correspondence on 29 November 2018, raising further questions as to their entitlement to indemnity from the assets of the FMIF. A copy of that correspondence is set out at pages 282 to 283 of the Bundle.
152. I am also aware that Ms Trenfield's Affidavit deposes to the facts that:
- (a) the MPF Trustee "has indicated that none of the proofs of debt which it has lodged are sought to be indemnified from the assets of the FMIF";
 - (b) there are two further claims for the aggregate sum of \$442,621.29;
 - (c) there are also a further fourteen claims which might potentially give rise to a claim against the FMIF (Ms Trenfield does not specify the amounts), regarding which the Liquidator has sought further information.
153. In the absence of further information about the nature of the proofs of debt that give rise or might give rise to indemnity claims against the FMIF, or their quantum, I am not currently in a position to provide any sensible estimate of my remuneration or costs of finalising the proof of debt process.

Interim and Final Distributions

154. A final distribution will, of course, be made at the conclusion of the winding up of the FMIF.
155. However, it is in my view strongly desirable that an interim distribution, or a number of interim distributions, be made to the members of the FMIF as and when it is possible to do so.
156. With the discontinuance of the proceedings brought by the MPF Trustee against the FMIF earlier this year, in my view it is now possible to consider such a distribution.

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Witnessed by:



157. The December 2015 Orders direct me not to make any distribution to the members of the FMIF, without the authority of a further Order of the Court.
158. I intend to make such an application for authority by 1 February 2019, in the event that it is still necessary for me to do so following any orders made by the Court following the hearing of the Application.
159. Other than the application for authority, the other matters to be attended to prior to doing so are as follows:
- (a) finalisation of the proof of debt process;
 - (b) resolving the issue with the register of members of the FMIF explained above, as to the holdings of foreign currency investors;
 - (c) approval by the Court of a settlement of the Feeder Fund Proceedings. In the event that the Court does not approve that settlement, I consider that it may still be possible to make an interim distribution to the other members of the FMIF, retaining an amount pending the outcome of the Feeder Fund Proceedings.
160. My previous reports to investors have for some time now, referred to my intention to apply to Court for approval to make an interim distribution to investors. My last ten reports to investors are exhibited to Mr Park's Affidavit from pages 90 to 373 of exhibit "JRP-10".
161. Most recently, in my report to investors issued 28 September 2018, I provided on page 13 an outline of the further steps (including estimated timing) that are required to be taken to allow an interim distribution, which contemplated an application to Court to permit an interim distribution and to correct the register of members being filed by December 2018 and payment of an interim distribution by January 2019.
162. Because of certain delays, including by the Liquidator in adjudicating the proofs of debt, and the negotiations for resolving the Feeder Fund Proceedings, I now estimate such an application to be made by 1 February 2019.

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163. In the event that it is still necessary for me apply to Court for authority to make an interim distribution following any orders made by the Court at the conclusion of this application, I estimate that my remuneration and expenses for doing so would be remuneration of about \$10,000 (excluding GST), plus solicitors and Counsel fees of about \$30,000 to \$50,000 (excluding GST).
164. In the event that it is necessary or appropriate for me to seek further authorisation to make a subsequent interim or a final distribution, that will involve further remuneration and expenses; while I am not in a position to estimate such remuneration and expenses with any precision at this stage (given that such an application is presently hypothetical), assuming that the issues that would need to be addressed on such an application would be similar to those raised on the application mentioned in the previous paragraph, I estimate (so far as is presently possible) that my remuneration and legal costs for such an application would be of a similar order to the amount of my estimate, in the previous paragraph, in respect of an application for authority to make an interim distribution; it may be less, if certain legal and factual issues are clarified or resolved as part of the determination of the first application.
165. I also estimate that my remuneration to make a distribution, if authorised, will be \$10,000 to \$15,000 (excluding GST) for each distribution.

C. LEGAL PROCEEDINGS

166. As I say above, I have caused various proceedings to be brought in the name of LMIM as responsible entity of the FMIF, or have otherwise caused proceedings to be funded for the benefit of the FMIF. I have also defended various proceedings which sought recourse against the assets of the FMIF.
167. My strategy has always been and will continue to be, to explore opportunities to resolve legal proceedings in a commercial manner so as to achieve the best possible outcome for FMIF members.

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168. I set out below a detailed report of each claim that I have caused to be brought in the name of LMIM as responsible entity of the FMIF, or otherwise caused PTAL as custodian of the FMIF to fund.

Auditors' Claim

169. I caused Supreme Court proceedings 2166/15 (**Auditors' Claim**) to be brought by LMIM as RE of the FMIF against the auditors of the FMIF for professional negligence and misleading and deceptive conduct in the conduct of the half year review and end of year audits of the Financial Statements of the FMIF, and of the annual compliance plan audits.

170. The amount of the claim is for in excess of \$200 million.

171. Prior to commencing this claim, public examinations were held to examine relevant witnesses and documents, to investigate the prospects of this claim.

172. As a result of the public examinations being held, I consider that the prospects of this matter resolving at an early stage are much higher than might otherwise be the case.

173. I made a decision at the outset of this claim, not to seek litigation funding, because the FMIF had sufficient funds to pay the costs of this claim and I did not think it was commercially justifiable to incur the costs of litigation funding.

174. This claim is on the commercial list before Jackson J. An order has been made for a mediation to be held by 15 March 2019.

175. In my view, the timing of this Application is regrettable. In my experience, the funding position of a plaintiff in a claim of such magnitude is a significant factor in causing a defendant to meaningfully engage in settlement negotiations, in the knowledge that if a settlement is not reached, the plaintiff has the funds and commitment to take the matter further.

176. Further, my staff and I, as well as my partners in the Audit group who have assisted me, have a detailed knowledge of this claim and have undertaken detailed accounting investigations in relation to the quantum of this claim, at various points in time, and have provided detailed

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instructions and analysis for the purposes of preparing a response to an extensive request for further and better particulars.

177. I am informed by Mr Scott Couper, of Gadens, my solicitors in the Auditors Claim, that if the mediation is not successful, the matter is likely to take between 18 months and two years for the proceeding to be determined or resolved.
178. If this proceeding does not settle at mediation, I intend to bring an application to Court for directions as to whether I am justified in proceeding with this claim, with or without litigation funding.

Bellpac Proceeding

179. I caused Supreme Court proceedings 12317/14 (**Bellpac Proceeding**) to be commenced by LMIM as RE of the FMIF by claim filed on 19 December 2014, against LMIM in its own right, the MPF Trustee and various directors of LMIM.
180. It is alleged that LMIM as RE of the FMIF acted in breach of trust and duty by executing a settlement deed, to settle a dispute with a purchaser of a security property over which the FMIF had a first registered mortgage and the MPF had a subsequent registered mortgage, which provided for the settlement proceeds to be split between the FMIF and the MPF.
181. The sum of \$15,546,147.85 was received by LMIM as trustee of the MPF from the settlement proceeds, and that amount plus interest is the amount of the claim including under section 1317H of the Act.
182. A mediation was held in 2016. Settlement negotiations then took place for over 12 months, but did not result in a settlement.
183. The MPF Proceeding is ongoing and is being managed on the Commercial List by Justice Jackson. The matter is being readied for trial. It is anticipated that the matter will be ready to be listed for trial in the first half of next year.


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184. A sum of \$1 million is held in the trust account of Gadens Lawyers as security for costs in the Bellpac Proceeding, having been paid into that trust account from the property of the FMIF.

Clear Accounts Proceeding

185. I caused Supreme Court proceedings 11560/16 (**the Clear Accounts Proceeding**) to be commenced in the name of LMIM as responsible entity of the FMIF against LMIM in its own right, to preserve claims for damages or equitable compensation suffered by the FMIF as a result of breaches of trust or duty by LMIM.

186. This is an important proceeding for FMIF members. My purpose in causing it to be commenced was and remains to preserve a clear accounts rule defence to the indemnity that would otherwise be available to LMIM as trustee.

187. A copy of the Amended Claim and Statement of Claim in the Clear Accounts Proceeding is at pages 284 to 325 of the Bundle.

188. At the time these proceedings were commenced, there were various very substantial claims that were on foot against the FMIF, which sought to rely on LMIM's right of indemnity.

189. Those proceedings have been discontinued however, I am conscious that Mr Park may in due course notify further Creditor Indemnity Claims as part of the proof of debt process.

190. Mr Park was appointed as the person to represent the interests of LMIM in its own right in the Clear Accounts Proceeding, pursuant to section 59 of the *Trusts Act 1973* (Qld), by the orders of the Honourable Justice Jackson made on 25 July 2018.

191. A copy of the orders made on 25 July 2018 is at pages 326 to 327 of the Bundle.

192. As part of the same orders, the Clear Accounts Proceeding was stayed pending completion of the proof of debt process, and the identification of the creditors who will stand to benefit from any indemnity claims who might be called upon to fund a defence of the Clear Accounts Proceedings.

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193. The extent to which it is necessary to proceed with the claims made in this proceeding will not be known until after completion of the proof of debt process. Relevantly, if the aggregate quantum of claims against the FMIF is low, I do not anticipate that it would be necessary or appropriate to advance all of the claims currently pleaded.
194. I understand that Mr Park seeks orders in the Application that he be appointed as a 'contradictor' in the Clear Accounts Proceedings.
195. I am not certain what effect it is intended such an order would have, in circumstances where Mr Park has already been appointed as the person to represent the interests of LMIM in its own right in the Clear Accounts Proceeding.
196. I assume that the application to be appointed contradictor is really about funding.
197. In my view, if that is the case, the application is premature, as the proceedings are stayed and, prior to the completion of the proof of debt process, it is not known the extent to which it may be necessary to re-enliven them (if it is necessary to do so at all).
198. If it is necessary to do so, I am prepared at that point to consider the question of funding. In principle, I would have thought that it should be the creditors who will benefit from any Creditor Indemnity Claims that would be the appropriate parties to fund the defence of the Clear Accounts Proceeding.
199. However, that will be a matter for the Court's determination, if the issue arises.
200. I am informed by Alex Nase, of Tucker and Cowen, my solicitors in this proceeding, and believe that he estimates that, from when any order is made lifting the stay, if only the claims made in relation to pre-paid management fees were proceeded with, and if the claim is defended, it is likely to take about 12 months for this proceeding to be resolved or determined. In my view, we will probably only need to advance certain limited parts of the claim that will be the least expensive to prove, and the most likely to be successful, unless further substantial claims against the FMIF emerge.


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Feeder Fund Proceedings

201. I caused Supreme Court proceedings 13534/16 (the **Feeder Fund Proceedings**) to be commenced to seek orders confirming whether the Feeder Funds were disentitled from receiving further distributions in the winding up of the FMIF, to the extent of the benefits previously provided to them from the FMIF in breach of trust (subject to any necessary adjustments), and to confirm whether a number of income distributions and deemed re-investments were void.
202. The key defendants to the Feeder Fund Proceedings are:
- (a) LMIM in its capacity as responsible entity of the LM Currency Protected Australian Income Fund (**CPAIF**);
 - (b) Trilogy Funds Management Limited in its capacity as responsible entity of the LM Wholesale First Mortgage Income Fund (**WFMI**);
 - (c) LMIM in its capacity as RE of the LM Institutional Currency Protected Australian Income Fund (**ICPAIF**); and
 - (d) LMIM in its own right.
203. The key allegations against each of the defendants are, in most respects, materially identical.
204. A copy of the Second Further Amended Statement of Claim in the Feeder Fund Proceedings is at pages 328 to 360 of the Bundle.
205. On 13 June 2018, his Honour Justice Jackson directed pursuant to section 59 of the *Trusts Act* 1973 (Qld) that:
- (a) Mr Said Jahani of Grant Thornton, the privately appointed receiver to the assets of the CPAIF and the ICPAIF, represent the interests of LMIM in its capacity as responsible entity of the CPAIF and the ICPAIF;
 - (b) Mr Park represent the interests of LMIM in its own right.
206. A copy of the orders made on 13 June 2018 is at pages 361 to 366 of the Bundle.

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207. I am aware from my involvement in the Feeder Fund Proceedings to date that the interests of the Feeder Funds are being actively and vigorously advanced by Mr Jahani and his solicitors (HWL Ebsworth) and counsel (Mr Dominic O'Sullivan QC with Mr David Turner), as well as by Trilogy and its solicitors (Squire Patton Boggs) and counsel (Ms Philippa Ahern).
208. As noted above, a confidential settlement was reached at mediation (subject to a Deed being finalised). The settlement is subject to judicial advice being obtained.
209. I am informed by Mr Scott Couper of Gadens, my solicitors in this matter, and believe if this matter was to fail to settle and instead proceeds to trial, that the trial would likely take place in about late 2019 to early 2020.

Bellpac Bonds Proceedings

210. There are a number of related proceedings in the Federal Court.
211. The FMIF has a first ranking security over the assets of a borrower from the FMIF, Bellpac Pty Ltd (Receivers and Managers Appointed) (In Liquidation) ("**Bellpac**").
212. In August 2008, \$10 million of Bonds were issued by Wollongong Coal Ltd (**WCL**) to Bellpac. These Bonds were then transferred to another party, who further transferred the Bonds to other parties
213. Proceedings by Bellpac, and its liquidators, in regard to \$2 million of the Bonds commenced in, or around, January 2010 ("the **\$2M Proceeding**").
214. On 30 September 2011, the Honourable Justice Emmett of the Federal Court of Australia ordered that Bellpac was the true owner of the Bonds (*Warner v Hung; Re Bellpac Pty Ltd (Receivers and Managers appointed) (in liquidation)* (2011) 297 ALR 56).
215. On 17 May 2013, the Full Court of the Federal Court dismissed the appeal in relation to that primary decision, and upheld Bellpac to be the true owner of the Bonds (*Hung v Warner; Re Bellpac Pty Ltd (Receivers and Managers appointed) (in liquidation)* [2013] FCAFC 48).

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216. The net proceeds of the \$2 million bonds settlement are held by the Bellpac liquidator, and are being utilised to fund the recovery of the \$8 million of WCL convertible bonds.
217. On or about July 2012, the liquidators of Bellpac commenced proceedings in Federal Court of Australia proceeding number NSD1063/2012 (“the **\$8M Proceeding**”).
218. The \$8M Proceeding is a claim that Bellpac is the true owner of the \$8 million Bonds transferred by WCL.
219. On 18 September 2015, the Honourable Justice Griffiths found that Bellpac was the true owner of the \$8 million Bonds.
220. One further claim was then made against WCL by the Bellpac Pty Ltd liquidator with respect to non-conversion of \$8 million of bonds to shares, where the FMIF holds a first ranking security over the assets of Bellpac.
221. The liquidator has entered into a confidential Heads of Agreement (“**HOA**”) with WCL to settle that proceeding on terms that (among other things) an amount of \$6.3 million be paid to Bellpac.
222. It is expected that these proceedings will result in a substantial recovery for the benefit of FMIF members, in the liquidation of Bellpac, and possibly as early as early 2019.

Claim against the Bankrupt Estate of Ross Lamb (bankrupt)

223. PTAL as custodian of the FMIF obtained a default judgment against Mr Lamb in the Supreme Court of New South Wales for approximately \$3 million, plus interest and costs.
224. Mr Lamb then filed a debtor’s petition and was declared bankrupt.
225. Mr Lamb and his wife had been parties to a Development Agreement. The proceeds of sale of 11 lots owned by Mr Lamb and his wife (in some cases, with another party) that were developed and sold are held in a solicitor’s trust account.

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226. There is presently in excess of \$12 million in the solicitor's trust account, being essentially the profits of the development, protected on an interim basis by certain undertakings given by the solicitors holding the funds.

227. Mr Lamb's former trustee in bankruptcy had been liaising with other parties involved in the development and investigating whether the bankrupt may have an entitlement in respect of the funds held in the solicitor's trust account.

228. It is alleged by the other parties to the dispute that Mr Lamb is not entitled to the profits. Instead, they allege that associated entities to Mr Lamb and his wife (including their daughter, to whom Mr Lamb transferred shares in the entity that undertook the development for no consideration) and the joint venture partner with whom Mr Lamb and his wife undertook the development are the parties entitled to be paid the profits.

229. The current Trustees of the bankrupt estate of Mr Lamb are Mr David Clout and Ms Patrica Talty, of David Clout and Associates. I am informed by Mr David Clout, of David Clout and Associates, and believe that:

(a) Their investigations are ongoing;

(b) There have been informal discussions with the bankrupt regarding a possible proposal under s 73 of the Bankruptcy Act;

(c) It is estimated that:

(i) a public examination, if proceeded with, will likely occur in early 2019;

(ii) any recovery proceeding will take approximately 12 to 18 months to prosecute to a determination.

230. At pages 367 to 371 of the Bundle is a copy of the most recent report to creditors issued by Mr Clout.

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231. In that report, Mr Clout states that “I anticipate that a material portion of these funds [the funds held in the solicitors trust account] will be recoverable for the benefit of the bankrupt estate, however, due to the complexity of the issues involved and the commercial sensitivity, I am unable to disclose my estimate in this report”.
232. I have instructed PTAL as custodian of the FMIF to enter into a Deed of Indemnity to fund a public examination under the *Bankruptcy Act 1966* (Cth), to further investigate the claims available to the Trustee and any relevant recovery proceedings

Claim against David Coulter

233. There are also payments due under a Deed of Settlement with another guarantor, David Coulter.
234. A series of payments are to be made, with a final payment due by 1 November 2019.

Lifestyle and KPG Proceedings

235. In 2014, KordaMentha Pty Ltd in its capacity as trustee of the MPF as plaintiff commenced Supreme Court proceedings 8032 of 2014 and 8034 of 2014 (“**the Lifestyle and KPG Proceedings**”) against LMIM as defendant.
236. The claims made in the KPG and Lifestyle Proceedings concerned the assignment from the FMIF to the MPF of certain loans (i.e. the Lifestyle and KPG Loans), for which KordaMentha as the current trustee of the MPF said that the MPF overpaid.
237. It was alleged that because LMIM acted both in its capacity as trustee of the MPF and in its capacity as RE of the FMIF, its indemnity against the property of the FMIF ought to respond to the claim.
238. On 17 December 2015, I was joined to the proceeding as the second defendant, in my capacity as Court-Appointed Receiver of the property of the FMIF, to defend the claims made against the assets of the FMIF. LMIM was excused from filing a defence until further order. At pages 372 to 375 of the Bundle is a copy of those orders.

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239. On 9 May 2016, the liquidator's solicitors sent an email to my solicitors informing them that LMIM would not take any active role in the proceeding due to insufficient funds. At pages 376 to 377 of the Bundle is a copy of that email.
240. BDO staff under my supervision conducted detailed accounting investigations in relation to this claim, which established that the funds allegedly paid by the MPF Trustee to the FMIF pursuant to the Deeds of Assignment, (with the exception of payments totalling about \$5 million) were not in fact received into FMIF bank accounts, but rather, were paid to LMIM or LMA for management fees, or to the Feeder Funds, or otherwise were directed by LMIM to other parties.
241. During the course of the matters, my solicitors corresponded extensively with the solicitors for the MPF Trustee regarding deficiencies in the plaintiff's pleadings, which resulted in a number of amendments being made to the pleading, including a constructive trust claim being abandoned.
242. I brought a strike out Application which was unsuccessful and in respect of which a judgment was delivered by Applegarth J: *Kordamentha Pty Ltd v LM Investment Management Ltd & Anor* [2016] QSC 183.
243. The accounting investigations undertaken by BDO ultimately led to the Clear Accounts Proceeding being commenced.
244. The proceedings were adjourned for over 12 months from about late 2016, to allow settlement negotiations to take place. Those settlement negotiations were not successful.
245. Once the settlement negotiations broke down, my solicitors sent various correspondence to the MPF Trustee's solicitors requesting that the proceeding either be progressed or discontinued.
246. On 18 April 2018, my solicitors wrote to the solicitors for the MPF Trustee informing them that it may have an interest in the Clear Accounts Proceeding being defended, because the Claims made in the Clear Accounts Proceeding will be relied upon as a defence to the KPG and Lifestyle Proceedings. At pages 378 to 382 of the Bundle is a copy of that letter.


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247. Following termination of the MPF Trustee's litigation funding agreement, the MPF Trustee sought judicial advice that it would be justified in discontinuing the proceeding.
248. On 8 June 2018, the MPF Trustee discontinued the KPG and Lifestyle Proceedings, in accordance with judicial advice given by Justice Boddice on 7 June 2018.
249. I understand that the MPF Trustee has lodged a proof of debt in the liquidation of LMIM with respect to the personal claims made against LMIM in these proceedings.
250. To finalise this proceeding, there are some costs orders the quantum of which is yet to be agreed or assessed, which will result in recovery of some costs for the FMIF.

AIIS Proceeding

251. On 16 December 2015, the MPF Trustee also commenced Supreme Court proceedings 12716/15 (the **AIIS Proceeding**).
252. The AIIS Proceeding relates to a loan ("**MPF Facility**") made by LMIM ATF the MPF to Australian International Investments Services Pty Ltd ("**AIIS**").
253. The MPF Trustee alleged that:
- (a) AIIS was a wholly owned subsidiary of LMIM ATF AIIS acquired a long-term leasehold interest in land located at 7 Irving Street, Phillip, ACT ("**the Land**");
 - (b) PTAL ACF the FMIF advanced funds to AIIS ("**FMIF Facility**"), as did the MPF ("**MPF Facility**"). PTAL ACF the FMIF was the first mortgagee and LMIM ATF the MPF was the second mortgagee;
 - (c) various increases to the amount of the MPF Facility were approved, from time to time, in breach of duties owed by LMIM ATF the MPF to members of the MPF;
 - (d) the funds advanced by LMIM ATF the MPF to AIIS in breach of duty were used, in part, to service interest on the FMIF facility; and


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- (e) the interest payments were received by LMIM ATF the FMIF, with knowledge that the payments were made by LMIM ATF the MPF in breach of trust.
254. The relief sought included a personal claim against LMIM for equitable compensation in the sum of \$16,820,356.30 plus interest and costs, and claims against LMIM for a constructive trust and other proprietary relief against assets of the FMIF in the sum of \$3,905,721.81, plus interest and costs.
255. Earlier this year, my solicitors sent various letters to the MPF's Trustees solicitors requesting that the proceeding be either progressed or discontinued, outlining difficulties with the claim and threatening to apply to join me as defendant to defend the claims made against FMIF assets.
256. At pages 383 to 394 of the Bundle is a bundle containing copies of various correspondence between my solicitors, Tucker & Cowen, and the solicitors for the MPF Trustee, Minter Ellison, sent earlier this year in relation to this claim.
257. Following that correspondence, on 5 July 2018 the MPF Trustee applied to the Court for directions as to whether it would be justified discontinuing the proceeding, and on 9 August 2018, the Court directed it would be. The AHS Proceeding has been discontinued.
258. I understand that the MPF Trustee has lodged a proof of debt in the liquidation of LMIM with respect to the personal claims made against LMIM in this proceeding

D. THE LIQUIDATOR'S PROPOSAL

259. In my view, Mr Park's proposal is not in the best interests of the members of the FMIF, for the reasons which follow.

Application for deferral of 50% of remuneration and expenses

260. In my view, the Liquidator's Application for deferral of 50% of both of our remuneration and expenses is highly unusual.

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261. During the course of my career, I estimate that I would roughly have accepted, and carried out about 200 appointments as receiver, liquidator or administrator.
262. On some occasions, payment of expenses and remuneration have been deferred pending hard asset realisations such as real property, plant and equipment or floating charge assets rather than litigation, from which the remuneration was to be paid.
263. However, in none of those other appointments have I encountered a regime where 50% of remuneration and expenses was deferred until the conclusion of the winding up.
264. Having consulted with my partners, I am not in a position to consent to such an appointment.
265. For the assistance of the Court, however, I address below what I consider would be the effect of such a regime on the arrangements presently in place in the winding up of the FMIF.

Effect on litigation matters

266. As to the litigation matters, if a regime such as that proposed by the Application were put in place, I could not be certain that my existing solicitors or counsel would be in a position to continue to act.
267. I consider that there would be two or potentially three options open to me to pursue, as follows:

- (a) *First*, I could cause BDO to pay the remaining 50% of expenses from its own resources without immediate recourse to the Fund, to recover the balance in due course. This would alleviate the risk of my solicitors and counsel not being in a position to act.

Having consulted with my partners, however, this is not a solution that is open to me to consider.

- (b) *Second*, I could re-negotiate the costs agreements in place with my solicitors, such that they are on a partially conditional basis.

I do not know whether this is something which my solicitors would be willing to accept.

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(c) *Third*, provided that the Court considered it appropriate for me to do so, I could pursue the possibility of litigation funding.

However, the costs of litigation funding are significant. From my experience having previously sought litigation funding, I expect the costs of such funding may be in the vicinity of 35% to 50% of the net proceeds of the action, after payment of legal costs and outlays funded by the litigation funder.. For that reason, and as I explain above, I do not think that this would be in the best interests of the members of the FMIF.

268. Otherwise, in my experience, the funding position of a plaintiff in any claim, particular significant claims such as the Auditors' Claim, is a significant factor in causing a defendant to meaningfully engage in settlement negotiations, in the knowledge that if a settlement is not reached, the plaintiff has the funds and commitment to take the matter further.

269. In my opinion, the effect of orders such as those proposed in this Application would be to compromise my negotiating position in the litigation matters I am pursuing for the benefit of the members of the FMIF.

Other service agreements

270. The FMIF also has a number of services agreements in place. The significant services agreements, and the payment terms under those agreements may be summarised as follows:-

Service Provider	Description of Services	Payment Terms	Periodic fee (if fixed amount)
Grace Records	Records storage	Monthly invoices/payment terms	\$1,062.71 per month
Surety IT	Server – database management	Invoices issued monthly in advance. Payment due 7 days after invoice issued	\$935 per month
Cloud Plus	Database storage	Invoices issued in advance (if fees and	\$8585.50 per



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		charges known in advance) or monthly in arrears. Payments due within 14 days of invoice	month
Worldwide Printing	Printing services, including quarterly reports to investors, half-year remuneration notices and other notices as directed by the Court from time to time	Monthly invoices are issued	Quarterly reports to investors for about \$10,000 each, half yearly remuneration notices of about \$2,500 each
Gadens	Acting for Mr Whyte in the Bellpac, the EY and the Feeder Fund Proceeding	Monthly invoices issued, invoices payable within 14 days of invoice	
Clayton Utz	Acting for Mr Whyte in proceeding in Western Australia against Guarantor	Monthly invoices are issued.	
Tucker & Cowen	Acting for Mr Whyte in relation to various legal proceedings and various matters relating to the winding up of the FMIF as instructed from time to time	Monthly invoices issued, Invoices payable within 14 days of invoice	

271. If 50% of expenses are to be deferred until the conclusion of the winding up, the above service providers may not be prepared to continue to provide their services on such terms, or at least without renegotiating terms.

272. This is likely to result in additional costs to FMIF members and delay, particularly if the solicitors acting for me in the various proceedings were unable to continue to act, or if litigation funding had to be obtained in order to continue to run the actions.

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Conflicts

273. There are, in my view, conflicts of interest or duty between LMIM in its own right and its Liquidator, and the members of the FMIF, that still exist in the winding up of the FMIF.
274. *First*, LMIM is a Defendant to the Bellpac claim.
275. By the Application, Mr Park also seeks to take over the prosecution of the Bellpac Proceeding.
276. However, there is an obvious conflict between Mr Park taking over the conduct of this claim on behalf of the plaintiff, as he proposes, when he is also representing the interests of one of the defendants, LMIM.
277. Specifically, by orders made on 21 July 2015, Mr Park was appointed to represent the interests of LMIM in its own right as the seventh defendant, although he subsequently sought and obtained orders on 28 April 2016 that he be excused from further appearance.
278. *Secondly*, there is a further conflict in relation to applications by the Liquidator to recover expenses and remuneration from the property of the FMIF.
279. To date, my role has included responding (where and insofar as it is appropriate) to applications by the Liquidator to recover expenses and remuneration from the property of the FMIF.
280. In the event that the orders sought by the Application are made, there will be no contradictor to such applications, other than the individual members of the FMIF. They face substantial hurdles (informational as well as financial) to taking on such a role.
281. In my view, the amounts by which the Liquidators previous claims for remuneration and expenses from the FMIF have been reduced by the Court and the complex nature of such claims evidence the need for a contradictor. Relevantly:
- (a) Submissions made by me have resulted in a reduction to date of remuneration recovered from the FMIF by \$1.3 million (excluding any GST), and of expenses indemnified from the FMIF in the amount of \$366,536.


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(b) A second application by the Liquidator for remuneration is reserved, in which I have made submissions resisting a material proportion of the further remuneration claimed from the FMIF.

282. I address my approach to these applications by the Liquidator in more detail below.

283. I also note that this is likely to be a continuing issue, where I understand from Mr Park and Ms Trenfield's Affidavits that they intend to seek to recover further substantial amounts by way of expenses from the FMIF.

284. *Thirdly*, there are conflicts between the interests of creditors of LMIM (who Mr Park represents under the December 2015 Orders), and the interests of FMIF (who I currently represent).

285. Specifically, the December 2015 Orders separate the role of Mr Park, who is to adjudicate proofs of debt and identify and advance indemnity claims, and my role, which is to determine whether to accept an indemnity claim that is made.

Transitional Costs of transferring responsibility to the Liquidator

286. The remaining non-litigation tasks are relatively limited.

287. However, many of those tasks are a continuation of the work that I have been attending to over the last five years.

288. For example, the audit of the winding up of the FMIF will necessarily deal with all of the transactions of the FMIF since 2013, and may require detailed instructions and explanations to the auditors, which I am uniquely placed to provide.

289. By comparison, Mr Park has not been conducting any significant substantive aspects of the winding up, since my appointment in August 2013.

290. As to the maintenance of the register of members of the FMIF, again my staff and I have the background and experience in managing the register, and the databases and systems by which the register has been maintained to date.



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291. A further cost would be involved in Mr Park establishing a live database containing the books and records of the FMIF. It costs me approximately \$10,000 per month excluding GST, to maintain access to a live database containing the books and records of the FMIF.
292. Finally, there would also be a time cost associated with transitioning responsibilities from me to Mr Park.
293. From my experience in conducting the substantive aspects of the winding up of the FMIF, I can say that it would take Mr Park and his staff significant amounts of time to familiarise themselves with the relevant circumstances.
294. As such, despite the limited nature of the work remaining, there will in my opinion be significant transitional costs associated with transferring responsibility to complete the winding up of the FMIF to Mr Park.

Bellpac Proceedings

295. My staff and I have a detailed familiarity with the Bellpac Proceedings, having been involved in the initial investigations of the claim, have provided instructions as to all aspects of the litigation to Gadens during the course of the proceeding, and having performed an enormous amount of work in relation to the disclosure stage of the litigation.
296. As the matter has progressed in preparation for a trial next year, I have provided detailed strategic instructions and have been closely involved in conferences with my solicitors and counsel. I have an intimate knowledge of the matters in issue, which I rely on in providing instructions in connection with the matter.
297. If Mr Park and his staff were to take over this matter whilst the matter is being prepared for a trial expected to take place in the first half of next year (subject to the availability of trial dates), there would be a substantial amount of work involved for them to familiarise themselves with the case and the relevant materials.

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298. That work would not only result in significant additional costs to FMIF members, but would also I believe potentially jeopardise any prospect of the matter going to trial in the first half of next year.

Other matters

299. In addition to the above, I note that the hourly rates of my staff and I in the BDO Business Restructuring Division (who undertake the majority of the work) are lower than FTI's hourly rates for equivalent staff levels. At pages 395 to 398 of the Bundle is a copy of BDO's current hourly rates. At page 399 of the Bundle is a copy of FTI's hourly rates effective 1 March 2017, which I obtained from page 4 of Kelly-Anne Lavina Trenfield's Affidavit sworn 9 August 2018 in these proceedings.

300. Further, Ms Trenfield's evidence is that Mr Park supervises her work, for which Mr Park also presumably charges his time. However, Ms Trenfield's evidence in her affidavit sworn 9 August 2018 is that she is a Senior Managing Director of FTI, and has been a registered liquidator since March 2007. As such, she commands FTI's highest hourly rate, presumably the same as Mr Park's.

301. In my view, to have both Mr Park and Ms Trenfield both charging their full rate has the risk of further unnecessarily increasing costs.

Conclusions

302. In my opinion, the best way to minimise costs for the winding up of members going forward, is to retain the benefit of the considerable and detailed knowledge of my staff and I in relation to all of the relevant aspects of the winding up of the FMIF.

303. In addition, I believe that the members of the FMIF are used to receiving reports from BDO, and it would likely cause disruption and confuse members if these functions were transferred to another appointee, five years into the winding up.

304. In my view, to transfer substantial responsibilities for the winding up of the FMIF to Mr Park and his staff would burden the members of the FMIF with additional costs and cause further delay.

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Books and Records of FMIF

305. LMIM was the responsible entity or trustee of a number of managed investment schemes, including the FMIF.
306. There was a degree of intermingling and overlapping of information in the books and records maintained by LMIM in certain computer servers and hard copy books and records, such that, for example, a search of the computer servers for records related to one fund would likely turn up results relating to other funds.
307. It was therefore necessary to ensure that the appointee of one fund, could not access privileged books and records relating to another fund.
308. Applications were filed for directions in relation to access to books and records held by LMIM, which resulted in Orders being made by Justice Daubney on 18 December 2014 and 29 January 2015. At pages 400 to 414 of the Bundle is a copy of those Orders.
309. The effect of those Orders was that the relevant appointees were allowed to access documents on the computer servers or the hardcopy books and records (“**Books and Records**”) subject to an undertaking. At pages 415 to 416 of the Bundle is a copy of the undertaking which I provided pursuant to the 29 January 2015 orders.
310. If the orders sought in this application are made, that would require these Orders to be revisited in order to reflect the changed arrangements and to ensure that concerns as to preservation of confidentiality and legal professional privilege, as between the funds of which LMIM had been, or continues to be, trustee or RE, and between those respective funds and LMIM itself, continue to be appropriately dealt with.

Application to be appointed Contradictor

311. My solicitors, Tucker & Cowen, and Mr Park’s solicitors, Russells, have exchanged correspondence regarding Mr Park’s application to be appointed ‘contradictor’, in both the Clear Accounts Proceeding and the Feeder Fund Proceedings.

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312. A copy of Russells' letter to Tucker & Cowen dated 5 November 2018 is at pages 417 to 418 of the Bundle
313. I instructed Tucker & Cowen to respond to that letter by letter dated 15 November 2018, a copy of which at pages 419 to 421 of the Bundle.
314. On 16 November 2018, HWL Ebsworth Lawyers, the solicitors for Mr Jahani, sent a letter to Russells (copied to my solicitor, Mr David Schwarz) in relation to the directions sought by Mr Park. At pages 422 to 424 of the Bundle is a copy of that letter.
315. A copy of Russells' letter to Tucker & Cowen dated 30 November 2018, responding to Tucker & Cowen's letter dated 15 November 2018, is referred to at paragraph 70 above in this affidavit and appears at pages 217 to 218 of the Bundle.
316. As to the Feeder Fund Proceedings, from my experience and observations of Mr Jahani, he has vigorously represented the interests of LMIM as RE of the CPAIF and the ICPAIF as has his solicitors.
317. I am not otherwise aware of any unitholder of either the CPAIF or the ICPAIF who has indicated that they do not consider themselves to be adequately represented in the Feeder Fund Proceedings by Mr Jahani.
318. As to the Clear Accounts Proceeding, the proceedings are currently stayed, in the circumstances I have outlined above.

A special purpose liquidator

319. I have explained above that, in my view, it may be desirable for me to be authorised to conduct the final audit of the FMIF, and for making any interim and final distributions.
320. If the Court is amenable to this, it could be achieved by the Court appointing me of its own motion as a special purpose liquidator of LMIM in its capacity as RE of the FMIF, or by making further specific orders under section 601NF(2).


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321. I instructed my solicitors, Tucker & Cowen, to send correspondence dated 27 September 2018 to Mr Park's solicitors, Russells, setting out what I considered to be the most efficient way forward to finalise the winding up of the FMIF, which included a proposal to appoint me as special purpose liquidator. A copy of that correspondence is set out at pages 425 to 431 of the Bundle.

322. I understand that the Application has not formally presented this option to the Court.

E. BUDGETS / ESTIMATES

323. There are obvious difficulties in providing detailed or precise Budgets for the remainder of the winding up of the FMIF, particularly given that the principal tasks remaining in the winding up is the resolution or determining of the remaining legal proceedings on foot.

324. Even the remaining cost to the FMIF of the non-litigation aspects of the winding up are uncertain to some extent, as they are likely to be heavily impacted by the amount of time that is in fact required to resolve or have determined the remaining legal proceedings. For example, the costs of complying with the financial reporting conditions of the ASIC relief will be significantly higher if the winding up were to continue for a further 5 years, as opposed to if the winding up were to conclude in 6 months.

325. In my experience, the most significant factors in seeking to minimise the expense and delay in finalising a winding up are typically the competence and experience of the insolvency practitioners involved, and their familiarity with the relevant circumstances.

326. My estimates of the non-litigation aspects of the winding up are set out above.

327. As to the litigation aspects of the winding up, in my experience with conducting significant litigation, such as the Auditor's Claim, there are a large number of variables and vicissitudes which can significantly affect the actual cost, and impact upon the timeframe.

328. I am usually provided with regular cost estimates and updates from my solicitors in relation to the litigation matters on foot. I also have broad figures in mind in relation to the estimated costs, but the actual costs will vary depending upon the timeframes for litigation, and how the litigation

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in fact develops over time. I regularly keep track of the costs that are being incurred and review same on a monthly basis.

329. However, I have prepared a rough estimate of remuneration and expenses to conduct the litigation matters to about mid-2019, on a number of assumptions.

330. My estimated further remuneration to 30 June 2019 (on the assumptions noted below) is as follows (excluding GST):-

	Low	High
	\$	\$
Feeder Fund Proceeding	25,000	35,000
Auditor's Claim	200,000	300,000
Bellpac Proceeding	200,000	250,000
Other asset recoveries	10,000	20,000
Maintain member register/communications with and report to members	170,000	210,000
Maintain books and records and prepare management accounts	40,000	50,000
Remuneration application	15,000	20,000
Application to pay distribution	10,000	10,000
Distribution to members	10,000	15,000
Application by FTI for remuneration and expenses	10,000	15,000
	690,000	925,000

331. This estimate does not include remuneration in relation to any work that may be required that is not within the categories estimated above.

332. My estimated further litigation related costs and expenses to 30 June 2019 (on the assumptions and subject to the exclusions noted below and excluding GST) are as follows:-

	Low	High
	\$	\$
Funding of trustee in bankruptcy/solicitors to undertake PE in Ross Lamb bankruptcy	100,000	140,000

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Application for approval of remuneration	30,000	50,000
Application to Court for authorisation of interim distribution	30,000	50,000
Auditor's Claim	200,000	300,000
Feeder Fund Proceeding	60,000	100,000
Bellpac Proceeding	400,000	600,000

333. The estimated expenses do not include the following matters or issues, on the basis that it is not reasonably practicable to provide a meaningful estimate of the expenses in relation to same:

- (a) Any matters (such as issues arising in the winding up that may require advice) that are not specifically mentioned or estimated above; I note that I have also not included above an estimate of my costs in connection with this application before the Court, which is to be heard on 10 December 2018;
- (b) Any expenses associated with opposing any applications by the Liquidator for approval of fees and expenses – it is not known whether or not I would oppose any further application by the Liquidator for approval of remuneration or expenses, or if so, on what grounds;
- (c) any expenses associated with the Ross Lamb bankruptcy that are not related to the proposed public examination, and in respect of which funding from PTAL may be required (for example, funding associated with any application to Court by another party to release a portion of the funds held in the solicitor's trust account);
- (d) The Clear Accounts Proceeding – this proceeding is stayed. The extent to which it will have to be pursued, if at all, is not yet known.

334. I have adopted, and the estimates of litigation-related costs and expenses in paragraph 332 above have taken account of, the following assumptions:-

- (a) The Feeder Fund Proceeding settles in accordance with the confidential settlement reached, subject to a deed, at the mediation on 20 November 2019;

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- (b) The Auditor's Claim settles at or shortly after the mediation to be held on 4 and 5 March 2019, and the mediation is concluded within the two days allocated to it;
- (c) Both Junior and Senior Counsel are briefed by my solicitors to attend the mediation of the Auditor's Claim;
- (d) In respect of the estimates relating to the Feeder Fund Proceeding and the Auditor's Claim, that an application is made for judicial advice for approval of each settlement (that is, that there are two judicial advice applications made) and that advice is given in terms of each application on the first day allocated for the hearing of the application, without any adjournment;
- (e) The trial of the Bellpac Proceeding is heard over three weeks before 30 June 2019;
- (f) There are up to two interlocutory applications made in the Bellpac Proceeding prior to trial;
- (g) Both Junior and Senior Counsel are briefed by my solicitors to appear at the trial of the Bellpac Proceeding;
- (h) I continue to monitor recoveries from the Bellpac liquidator, the trustee in bankruptcy of a guarantor (Ross Lamb) and payments due under a deed of settlement by a guarantor (David Coulter);
- (i) I continue to maintain the member register and report to members on a quarterly basis;
- (j) I continue to maintain the books and records of the fund and prepare the management accounts on a six monthly basis;
- (k) I apply for payment of my remuneration in the usual way for the six months ended 30 April 2019;
- (l) A distribution is made to members in March 2019;


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- (m) Mr Park finalises the proof of debt process and does not press any substantial indemnity claim against the fund, for any creditor debts or claims (and therefore no cost);
- (n) Mr Park brings a further application for remuneration and expenses before 30 June 2019 (including for payment of a portion of the \$1.6 million expenses foreshadowed by Mr Park's affidavit). Subject to any directions that may be made by the Court, I will consider in due course whether or not it is in the best interests of FMIF members for any such application to be opposed by me on their behalf.

335. If any of these assumptions turn out to be incorrect, that could significantly affect the actual costs incurred. The actual costs incurred, particularly in the Feeder Fund Proceeding, the Auditor's Claim and the Bellpac Proceeding will also likely be affected by the actions of the defendants in each of those proceedings, with such actions affecting the path each proceeding will take.
336. My estimates of the legal expenses, which I have provided above, are based on information provided by my solicitors.

F. PROOF OF DEBT PROCESS

337. Correspondence about the process of identifying the creditors of LMIM and the FMIF began prior to Mr Park's application filed 8 April 2015 for directions as to the conduct of the winding up of the FMIF (**Residual Power's Application**).
338. Mr Park's position was articulated in a letter from Russells to my solicitors dated 21 January 2015, namely that it was for the Liquidators to call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF). At pages 432 to 434 of the Bundle is a copy of that letter.
339. In the Residual Powers Application, directions were sought to the effect that the Liquidators "shall discharge the functions duties and responsibilities", including "to call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the scheme property of the FMIF)."

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340. Following a hearing of the Residual Power's Application, and by the December Orders, relevantly:

- (a) Mr Park was ordered to ascertain the debts payable by, and the claims against, LMIM, to adjudicate upon those debts and claims, and to identify whether LMIM has a claim for indemnity from the FMIF with respect to such creditor debts or claims and notify within 14 days after any such indemnity claim is identified (paragraphs 4 and 6); and
- (b) Mr Park's entitlement to claim from the FMIF reasonable remuneration and LMIM's entitlement to claim from the FMIF its expenses for carrying out work it is required to do under the December 2015 Orders in connection with the FMIF, was explicitly stated in the December 2015 Orders (paragraphs 17 and 18).

341. Mr Park did not however then commence the proof of debt process until September 2018.

342. I am not aware of any satisfactory reason for this delay.

343. However, on 10 and 15 February 2016 Mr Park notified me of Administration and Recoupment Indemnity Claims under the December 2015 Orders, to advance a number of indemnity claims against the FMIF for his own expenses in the liquidation of LMIM.

344. I accepted some but rejected other of Mr Park's indemnity claims.

345. I caused those claims which I had accepted to be paid, and advanced the clear accounts rule only in relation to those claims I had rejected.

346. On 18 October 2016, Mr Park filed his material in support of his application dated 20 May 2016, disputing my rejection of the rejected claims (the **Indemnity Application**).

347. On 20 June 2017, at the hearing of the Indemnity Application:

(a) My Counsel, Mr McKenna QC, informed His Honour that:

- (i) The next step (broadly speaking) in the winding up of the FMIF is the identification of creditors of LMIM in respect of whose claims a right of

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indemnity from the property of the FMIF may be asserted and dealing with those claims through the proof of debt process and the indemnity regime established by the December Orders; and

(ii) I accept (and have always accepted) that the liquidators and LMIM) are entitled to be paid, from the property of the FMIF, their appropriate remuneration and expenses for attending to that work in connection with the FMIF under the December 2015 Orders;

(b) His Honour observed that, in His Honour's view, the December Orders provides a mechanism for the payment to the liquidators of such remuneration and expenses from the property of the FMIF.

348. At page 435 of the Bundle is a copy of the page of the relevant parts of the transcript.

349. On 22 June 2017, Russells wrote to Tucker & Cowen to inform them that Mr Park was concerned to ensure that funding is available for his expenses in relation to the proof of debt process and asserting that there was some doubt about the operation of paragraph 17 of the December Orders regarding the liquidator's expenses associated with the proof of debt process, given the clear accounts rule.

350. Russells also noted that I, through my counsel, Mr McKenna QC, had informed His Honour to the effect that (among other things), "*the calling for proofs of debt in the liquidation of LMIM was now critical to his ability to finalise the winding up of the FMIF*".

351. At pages 436 to 437 of the Bundle is a copy of that letter dated 22 June 2017.

352. On 27 June 2017, Tucker & Cowen wrote to Russells, on my instructions:

(a) to propose certain variations to the 17 December 2015 Orders, to give Mr Park additional comfort (if any further comfort was required) that his expenses associated with calling for proofs of debt, and for other work required by the December Orders, in connection with the FMIF, would be paid from the FMIF; and


Signed:

Witnessed by:



(b) to advise that I was open to considering any explanation or suggestions in relation to the allocation of LMIM corporate costs in relation to the proof of debt process.

At pages 437 to 439 of the Bundle is a copy of that letter.

353. Following further correspondence and discussions (including without prejudice discussions and correspondence), on 26 September 2017, Tucker & Cowen wrote to Russells to provide draft variations to the December Orders in relation to the proof of debt process, in line with the proposal made in the letter of 27 June 2017. At pages 440 to 442 of the Bundle is a copy of that letter dated 26 September 2017.
354. After I had sent correspondence to Mr Park inquiring as to his position and the cause for delay in calling for proofs of debt, on 25 January 2018, Russells wrote to Tucker & Cowen to provide an amended draft of the variations to the December Orders, and to inform them that once the variations were made, Mr Park would immediately commence the process of calling for proofs of debt in the liquidation of LMIM. At pages 443 to 445 of the Bundle is a copy of that letter.
355. There were then without prejudice negotiations between Mr Park and I, which resulted in the Terms of Agreement being signed on 18 June 2018, which dealt with a number of issues including the proposed variations to the December 2015 Orders.
356. On 18 July 2018, the agreed variations to the December Orders in relation to the proof of debt process were made by Justice Jackson, by consent.
357. Mr Park called for proofs of debt in the winding up of LMIM, with a due date of 2 October 2018 for proofs to be lodged.
358. Mr Park has not yet so far as I am aware ruled on any of those proofs, and Mr Park has not notified me as to whether any indemnity claims will be made from the FMIF or, if so, the amount of such indemnity claims, nor given me a timeframe for that process to be completed.
359. On 17 October 2018, Minters Ellison, the solicitors for the MPF Trustee, wrote to Clayton Utz, the solicitors for the DB Receivers, observing that the MPF Proofs do not assert any claim against

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Signed:

Witnessed by:



LMIM as responsible entity of the FMIF. That letter is referred to at paragraph 97 of this Affidavit and a copy of that letter appears at page 243 of the Bundle.

360. I then instructed Tucker & Cowen to send further correspondence to Russells in relation to the proof of debt process, as referred to in paragraph 149 of this Affidavit, above.

G. ISSUES AS TO REMUNERATION AND EXPENSES TO DATE

361. In this part of my affidavit, I endeavour to respond to a number of comments in Mr Park's affidavit on the topic of remuneration and expenses.

Liquidator's Remuneration

362. At pages 446 to 451 of the Bundle is a copy of a Presentation of Accounts and Statements (ASIC Form 524) lodged by Mr Park with ASIC for the period 1 February 2018 to 31 July 2018, which I note states on page 2 that the remuneration paid to Mr Park from the date of his appointment to the date which the account is made up to is \$4,803,028.12. This document was obtained by searching the records of ASIC.

First FTI Remuneration Application

363. By Further Amended Originating Application filed on 16 December 2015 in this proceeding, the Liquidators sought approval of remuneration to be paid from the FMIF of \$3,408,077.01 (if GST at a rate of 10% is included).

364. Of that amount, a total of \$1,827,205.23 excluding GST was approved (including remuneration and a small amount of out-of-pocket expenses).

365. Reasons for judgment with respect to the First FTI Remuneration Application were delivered by His Honour on 17 October 2018, and Orders made on 22 November 2017 to give effect to those reasons.

366. The amount of \$1,827,205.23 (not including any additional amount for GST) was paid on 20 December 2017.

Signed:

Witnessed by:

367. On 19 December 2017, the Liquidator filed an application (“**Payment Application**”) seeking payment of the amounts referred to in the Orders of 22 November 2017 plus GST by a certain date.
368. He did so notwithstanding that I had informed him of the reasons for the delay in payment, prior to his causing the Payment Application to be filed. Appearing at pages 452 to 453 of the Bundle is a copy of an email I sent to Mr Park on 18 December 2018, in which I referred to the reasons for delay in payment.
369. Specifically, there had been a delay in effecting payment because the DB Receivers had invested a substantial proportion of the FMIF’s funds in a term deposit, without prior notice to me.
370. Following the order for payment from the FMIF, the DB Receivers had to negotiate break costs, which took some time.
371. After payment had been made on 20 December 2017, the issue to be resolved by the Payment Application became the question of whether any GST was properly payable.
372. On 18 June 2018, the liquidators, LMIM and I entered into a Terms of Agreement covering certain outstanding matters at the time, as between the Applicants and me. On 3 July 2018, following entry into the Terms of Agreement, an Order was made by consent dismissing the Payment Application with no order as to costs.
373. On 27 June 2018 the Deputy Registrar also made Orders by consent fixing the quantum of the costs payable to the liquidators from property of the FMIF in relation to the First FTI Remuneration Application in the sum of \$230,889.31. At page 454 to of the Bundle is a copy of those Orders.

FTI Indemnity Application

374. Pursuant to the December 2015 Orders, on 10 and 15 February 2015 Mr Park and Ms Muller submitted two claims for indemnity for expenses to me, in the respective amounts of \$241,453.54 and \$375,499.78.



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Witnessed by:



375. The first claim of \$241,453.54 related to legal costs incurred in relation to the appeal of the decision appointing me as receiver to wind up the Fund. I did not immediately adjudicate this claim, and proposed that I defer adjudicating it until after the Court's decision in the First FTI Remuneration Application. I subsequently rejected it in full.
376. In respect of the second claim, I accepted and paid \$84,954.41 (\$93,449.85 less GST of \$8,495.44), rejected \$169,243.26 and deferred \$5,473.59 pending the judgement to be handed down in relation to the remuneration application. The balance of FTI's claim was withdrawn.
377. On 20 May 2016, Mr Park and Ms Muller filed an application seeking orders that they be indemnified from property of the FMIF for expenses in the total sum of \$410,694.84.
378. Mr Park did not file their affidavit in support of the Indemnity Application until 18 October 2016.
379. From an early point, before Mr Park's application was filed, I instructed my solicitors to raise with Mr Park's solicitors the potential application of the clear accounts rule to any claim relying on LMIM's right of indemnity. I also later instructed my solicitors to invite Mr Park's solicitors to amend or clarify the Indemnity Application to raise a direct claim by Mr Park, which would not be subject to the clear accounts rule. Mr Park eventually filed such an Amended Application on 30 May 2017, but in doing so only raised a direct claim in the alternative. At pages 455 to 466 of the Bundle is a copy of this exchange of correspondence.
380. On 30 May 2017, I obtained judicial advice in this proceeding from Burns J to the effect that I was justified in raising the clear accounts rule in opposition to the Indemnity Application.
381. The justification for incurring the not-insubstantial costs of the Indemnity Application included the broader significance of the clear accounts rule to the winding up of the FMIF, and the utility in having a ruling on that question to which reference could be made in my later negotiations in other proceedings.
382. The Indemnity Application was heard before Jackson J on 19 and 20 June 2017.
383. On 17 October 2017, His Honour delivered reasons for judgment, holding:

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Signed:

Witnessed by:

- (a) that the legal costs of the appeal in 8895 of 2013 of \$263,127.13 (the appeal against the Dalton J Orders appointing Mr Whyte) and costs of assessment of those costs in the sum of \$9,068.68 were not properly incurred and thus not payable out of the property of the FMIF;
- (b) that the clear accounts rule operated to suspend LMIM's right of indemnity out of the assets of the FMIF until the resolution of the claims made in the Clear Accounts Proceeding; and
- (c) that the liquidators were entitled to direct indemnity out of the FMIF for various amounts totalling \$44,158.

- 384. Orders to give effect to His Honour's reasons for judgment were made on 22 November 2017.
- 385. His Honour ordered that 90% of the liquidator's costs of the Application be paid on an indemnity basis as agreed with Mr Whyte, or otherwise as assessed by the Court.
- 386. Following entry into the Terms of Agreement between the liquidator, Mr Park and I on 27 June 2017, the Deputy Register made orders by consent fixing the quantum of the costs of the Application payable to the liquidator in the sum of \$220,859.31. At page 467 of the Bundle is a copy of those Orders.
- 387. Based on the invoices for legal costs and outlays provided by the Liquidators solicitors to my solicitors with respect to the Indemnity Application to support this claim for costs, I can say that Mr Park's legal costs of the Indemnity Application were not \$570,055 as asserted in paragraph 70 of his affidavit.
- 388. The amount of invoices for legal costs and outlays provided by the Liquidators to support the claim for costs with respect to the Indemnity Application, after some minor adjustments were taken into account, was \$265,048.22 including GST.
- 389. There was no formal costs assessment.


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Witnessed by:



390. Shortly after those orders were made, Mr Park's solicitors raised with my solicitors the fact that Mr Peden QC's invoice for the Indemnity Application had not been included in the order of the Deputy Registrar.
391. I nonetheless agreed in principle that Mr Peden QC's invoice should be accommodated, and be dealt with in the same way as the other costs of the Indemnity Application.
392. I remain willing to accommodate his invoice in this way and, on my instructions, this has been clearly communicated to Mr Park's solicitors.
393. Paragraph 72 of Mr Park's affidavit says that I sought an "extensive deed" to document payment of an additional amount for Mr Peden QC's invoice. That is not accurate. On advice, I have required the execution of a Supplementary Deed, that is appropriate to rectify the omission of Mr Peden QC's invoice from the Terms of Agreement and the order of the Deputy Registrar. The draft Deed is no more than 2 pages excluding the cover page and signing page.
394. At pages 468 to 480 of the Bundle is a copy of the letter from Tucker & Cowen to Russells dated 26 October 2018, together with the documents which were enclosed with it, regarding the issue of Mr Peden QC's invoice. To the best of my knowledge, the matters stated in the letter from Tucker & Cowen are true.

Second FTI Remuneration Application

395. By application filed 17 July 2018 ("**the Application**"), Mr Park, applied to Court for approval of his remuneration for acting as liquidator of LMIM in the sum of \$2,800,130.39 (including GST). Of that amount, a total of \$743,889.89 (including GST) is sought from property of the FMIF (**Document 234**).
396. A summary of the amount sought from the property of the FMIF is as follows:-
- (a) the sum of \$166,708.34 including GST for corporate remuneration during the administration period;

Signed:

Witnessed by:



- (b) the sum of \$165,830.36 including GST for corporate remuneration for the period 2 August 2013 to 30 June 2018;
- (c) the sum of \$316,345.70 including GST for category 1 remuneration in the period 1 October 2015 to 30 June 2018; and
- (d) the sum of \$95,005.49 including GST for Category 2 remuneration from 1 October 2015 to 30 June 2018.

397. I opposed certain parts of the Application.

398. The principal grounds of opposition to the Application included that:-

- (a) The liquidator is estopped from claiming further remuneration during the administration and during the Liquidation period up to 30 September 2015, because the liquidator's remuneration for those periods had been fixed in the First FTI Remuneration Application;
- (b) "corporate remuneration" – that is, remuneration for work performed that relates only to LMIM in its corporate capacity and that is not referable to a single fund or all of the funds collective - was not recoverable from the FMIF to the extent alleged or at all;
- (c) the FMIF ought not be ordered to pay GST on the amounts otherwise approved.

399. After obtaining advice, I formed the view that no GST was properly payable from property of the FMIF. However, this part of the claim was ultimately resolved, as a result of a commercial decision made by me to accept an undertaking provided by the Liquidator by his Counsel, to provide appropriate tax invoices to enable the FMIF to claim a reduced input tax credit.

400. The application was heard on 6 September 2018 and 3 October 2018.

401. His Honour has reserved judgment.


Signed:

Witnessed by:



Foreshadowed Indemnity Application

402. It is anticipated that there will be further applications by the liquidator for approval of expenses.
403. In particular, the liquidator has foreshadowed re-allocating approximately \$1.6 million in 'corporate' expenses to the various funds that LMIM is RE of, and making a claim for indemnity from the FMIF with respect to a portion of such expenses.
404. I will consider in due course whether or not it is in the best interests of FMIF members for me to oppose all or any parts of any such application.

Dealings with the liquidator in relation to recovery of remuneration and expenses

405. My approach in relation to claims by the liquidator for remuneration and expenses has been to endeavour to resolve any objections I might have to the claim by agreement, if possible.
406. However, if, after obtaining appropriate advice, I formed the view that the amounts claimed were not properly recoverable from the FMIF, and I formed the view that it was in the best interests of the members of the FMIF to do so, I have opposed parts of the liquidator's applications and, in doubt, have obtained judicial advice.
407. I have made a number of attempts to resolve the claims made by the liquidator.
408. In relation to the First FTI Remuneration Application, Mr Schwarz and I attended several without prejudice conferences with the Liquidator/s and their legal representatives to try to resolve the matter.
409. In relation to the First Indemnity Application, I accepted part of Mr Park's claim before any application to Court was made.

The Liquidator's concerns in relation to the process of resolving costs claims

410. There are certain concerns raised in Mr Park's Affidavit in relation to the process of agreeing the quantum of the Liquidators' costs, that require a brief response.

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Witnessed by:



411. In relation to paragraph 71 of Mr Park's affidavit, certain concerns are expressed by Mr Park in relation to the process of agreeing upon the quantum of costs orders made in favour of the Liquidators out of property of the FMIF.
412. At pages 481 to 484 of the Bundle is a copy of a letter from Tucker & Cowen to Russells dated 26 October 2018, which responds to the concerns raised by the liquidator in relation to the process of agreeing upon the quantum of the liquidator's costs. To the best of my knowledge, the matters stated in the letter from Tucker & Cowen are true.

Mr Whyte's Remuneration and Expenses to Date

413. I bring periodic applications to Court for approval of my remuneration, in the proceedings in which I was appointed. In support of each such application, I provide detailed evidence to the Court of the work for which I seek approval of my remuneration.
414. Prior to the appointment of Liquidators to LMIM, the management fees charged by LMIM as RE of the FMIF averaged \$14 million per annum, for the five years ended 30 June 2012.
415. I only apply for approval of remuneration every six months to minimise costs for members. This means that BDO therefore has to carry significant amounts of WIP for over six months, before the remuneration can be approved and paid.
416. Each of my applications for remuneration to date, have been approved in full.
417. I have made ten applications to Court for approval of my remuneration, as follows:-

Remuneration Period	Remuneration Order	Amount of remuneration approved (incl. of GST)
8 August 2013 to 31 March 2014	McMurdo J on 28 August 2014	\$702,480.35
1 April 2014 to 30 September 2014	Mullins J on 27 November 2014	\$1,005,948.35 (receivership) \$7,000.95 (controllership)
1 October 2014 to	Jackson J on 23 June 2015	\$1,761,911.25



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Witnessed by:



Remuneration Period	Remuneration Order	Amount of remuneration approved (incl. of GST)
30 April 2015		(receivership) \$442,214.30 (controllership)
1 May 2015 to 31 October 2015	Martin J on 11 December 2015	\$2,279,205.50 (receivership) \$194,052.10 (controllership)
1 November 2015 to 30 April 2016	Douglas J on 26 June 2016	\$1,405,155.40 (receivership) \$36,510.65 (controllership)
1 May 2016 to 31 October 2016	Daubney J on 2 December 2016	\$1,119,991.40 (receivership) \$13,385.35 (controllership)
1 November 2016 to 30 April 2017	Mullins J on 30 June 2017	\$897,580.20 (receivership) \$12,314.50 (controllership)
1 May 2017 to 31 October 2017	Applegarth J on 30 November 2017	\$1,280,897.20 (receivership) \$26,155.25 (controllership)
1 November 2017 to 30 April 2018	Boddice J on 21 June 2018	\$1,041,907.90 (receivership) \$22,306.90 (controllership)
1 May 2018 to 31 October 2018	Mullins J on 29 November 2018	\$1,946,635.35 (receivership) \$20,902.75 (controllership)

418. By way of brief summary, the extensive and valuable work performed by BDO in relation to the winding up of the FMIF has included the following highlights:

- (a) Reviewing relevant books and records of the FMIF to familiarise BDO with all aspects of its operations. This has been a significant task as the FMIF made a total of up to 60 loans and the amount invested by FMIF members was about \$478 million;

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Witnessed by:



- (b) Obtaining updated valuations of retirement villages and real property assets upon my appointment, to provide updated unit price estimates to members;
- (c) Asset sales strategies for complex retirement village assets including conducting complicated financial analysis and determining the appropriate sales strategy;
- (d) Overseeing the operations of the retirement villages, including reviewing and monitoring the operations, reviewing and analysing reports as to the operations of the retirement villages, dealing with issues relating to the day-to-day operations of the retirement villages, and liaising with operators in relation to matters such as construction works and attending to accounting and financial work including review of scheme operator accounts, data entry for payroll records, remitting superannuation payments, BAS statements, and other matters to enable the continued operation of the retirement villages;
- (e) Overseeing and managing the sale of the retirement villages, including obtaining updated valuations, appointing and instructing agents, reviewing and approving marketing budgets, preparing datarooms and collating extensive documentation to enable due diligence processes to be undertaken, negotiations relating to the sale of the assets, instructing solicitors in relation to the sales, providing specialist taxation advice or analysis in relation to the sales;
- (f) Investigating potential claims including detailed review of FMIF records to identify potential claims, updating master spreadsheets and other records of investigations conducted and evidence collated, providing instructions and documents to solicitors in respect of such claims, detailed preparatory work for a four week public examination in relation to the Auditor's Claim and other issues in the winding up, and attending to assist my Counsel and solicitors on the hearing of the public examination, obtaining and reviewing documents produced at public examination including complex accounting analysis of documents produced by auditors of FMIF to determine if a claim against Auditors can be pursued and identifying a number of other substantial claims

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Witnessed by:



that have or are being pursued to recover substantial funds for the benefit of FMIF members;

- (g) Achieving the repayment of DB, the secured creditor, in early 2014, working co-operatively with the DB Receivers during the course of the winding up to allocate tasks, avoid duplications and conduct the winding up as efficiently as possible for the benefit of FMIF members;
- (h) Ongoing and extensive work in relation to prosecuting or defending legal proceedings concerning the FMIF, including:
 - (i) Bellpac Proceeding – providing instructions and assistance to my solicitors in respect of all aspects of this proceeding, including extensive work identifying, reviewing and providing relevant documentation to enable completion of substantial disclosure, and work related to preparing this claim for a trial anticipated to be listed for the first half of next year (subject to the availability of trial dates);
 - (ii) KPG and Lifestyle Proceedings – providing instructions to my solicitors in relation to these substantial claims against FMIF assets, applying to be joined as Court-appointed Receiver to defend claims against FMIF assets, and conducting detailed accounting investigations critical to identifying deficiencies in the pleaded case and potential counterclaims that could be raised in defence of the claims, (which were ultimately advanced by way of a separate proceeding, the Clear Accounts Proceeding). I successfully pressed the MPF Trustee to discontinue these proceedings and the AHS Proceeding as well, earlier this year;
 - (iii) Successfully advancing the claim against the quantity surveyors to a conclusion and achieving a substantial recovery for the benefit of FMIF members;

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Signed:

Witnessed by:



- (iv) Funding the Liquidator of Bellpac with respect to the proceedings in relation to the WCL Bonds which have settled and are expected to yield substantial recoveries for the benefit of FMIF members;
- (v) Achieving a substantial reduction in relation to the First FTI Remuneration Application of the order of \$1.3 million, and a judgment that provides support for a more favourable apportionment of category 2 remuneration and expenses (remuneration or expenses referable to all of the funds) to the FMIF going forward;
- (vi) Negotiating a settlement with a borrower which has resulted in a substantial recovery for the FMIF;
- (vii) The Feeder Fund Proceeding – conducting detailed and extensive investigations in relation to this claim and its quantum, and successfully negotiating an early, commercial resolution to this dispute, which is expected to be finalised in the near future;
- (viii) The Auditor's Claim – conducting detailed and extensive accounting work to determine the quantum of the claim, which involving preparing detailed quantification of loss papers, calculating the loss caused to the FMIF, as a result of the FMIF not being wound up at an earlier date, on a number of different hypothetical receivership scenarios at 6 months intervals across the nine audit or review periods from 30 June 2018 to 30 June 2012 that required appropriate assumptions to be made as to matters such as sales timing and price and preparation of cash flows and detailed financial analysis to support such loss calculations, detailed review of 23 significant loans representing approximately 70% of the funds loan books and preparing loan summaries to identify where auditing standards not complied with, across nine audit or review periods from 30 June 2018 to 30 June 2012, and providing detailed instructions and documents to my Counsel and solicitors, at their request, to


Signed:

Witnessed by:



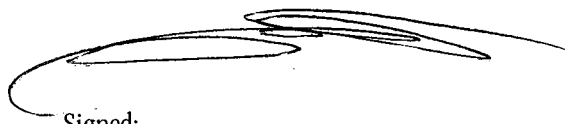
enable a response to a detailed request for further and better particulars to be prepared, which I believe will position me well to achieve a successful outcome at the upcoming mediation;

- (i) Successfully applying to ASIC for and obtaining relief from compliance with financial reporting and audit obligations, saving substantial funds for FMIF members and then having that relief extended;
- (j) Financial reporting to FMIF members including preparing financials for each financial year and half-year, to comply with the conditions of the ASIC relief;
- (k) Reporting to investors on a quarterly basis, with every second such report containing the information required by the conditions of the ASIC relief;
- (l) Maintaining and updating the Register of Members;
- (m) Responding to queries from FMIF members.

419. The work undertaken by BDO has been set out, in much greater detail, in the Affidavits filed in support of my remuneration applications.

420. The benefits received or obtained by the FMIF in the winding up to date, as a result of work undertaken by BDO, include the following (gross of fees or expenses of my receivership and not including interest on funds received):

Description of benefit	Approximate or estimated quantum of benefit (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)
Net Proceeds of sale of retirement village assets held by FMIF as security for loans to borrowers, which were sold by BDO	Approximately \$40 million – see note 1 below.
Discontinuance of KPG and Lifestyle in which I was joined as Second Defendant to defend claims made against FMIF assets	Amount claimed by plaintiff against FMIF assets approximately \$24 million plus interest and costs



Signed:

Witnessed by:



Description of benefit	Approximate or estimated quantum of benefit (funds received by FMIF, estimated costs savings, or face value of claim discontinued or dismissed)
Discontinuance of AHS proceeding	Amount claimed by plaintiff against FMIF assets approximately \$3.9 million plus interest and costs
Amount of remuneration sought from FMIF but not approved on First remuneration application by the liquidators, which I opposed	Approximately \$1.3 million (excluding any GST) – See Note 2 below
Recovery of funds from a borrower to whom the FMIF had advanced funds, as a result of negotiations undertaken by BDO	\$7.5 million
Recovery received by FMIF from proceedings against quantity surveyor, conducted by BDO alleging professional negligence in respect of certifying works on a completed commercial development	\$3 million
Amount of expenses sought but not approved on FTI Indemnity Application which was opposed by Mr Whyte	\$366,536 – See Note 3 below.
Estimated costs savings to the FMIF to date as a result of successful applications by Mr Whyte to ASIC for financial reporting and audit relief	Costs savings in auditor's fees alone estimate to be about \$140,000 - \$343,000 plus FTI's remuneration and expenses had they been involved in the process - See Note 4 below
Amount paid to FMIF by AIF and ASPF following entry into Terms of Agreement between Mr Whyte and FTI	\$212,700.83
Amount paid by Western Union pursuant to Deed of Settlement with Mr Whyte	\$66,055.31

Note 1 – The amount received from the sale of the retirement village assets was about \$10 million above the value of the retirement village assets, as assessed in professional valuations obtained by BDO prior to the sales. This figure also does not include incoming contributions received during



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the course of me managing the retirement villages, when empty units were sold to new residents who paid an incoming contributions.

Note 2 – this figure does not take into account additional remuneration or legal costs incurred as a result of opposing the Application, nor any future costs savings on future remuneration applications by the liquidator that may result from His Honour approving the apportionment of work referable to all of the funds (category 2 remuneration), as between the various funds that LMIM is or was responsible entity or trustee of, in a manner more favourable to the FMIF than was proposed by the liquidators.

Note 3 – this figure does not take into account additional remuneration or legal costs incurred as a result of opposing the Application. Further, it was held that, by reason of the clear accounts rule, LMIM's entitlement to indemnity for some of the amounts claimed cannot be determined until after the LMIM Claim is heard and determined.

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

421. At pages 485 to 511 of the Bundle is a copy of the *ex tempore* reasons for judgment delivered in respect of my applications for remuneration heard to date, save for my first application (which reasons I am informed by my solicitors are not on file) and the tenth application (which I am informed by my solicitors have not yet been received).
422. All of the retirement village and other assets have been realised and the remaining focus of BDO's work is resolving the legal proceedings on foot.
423. It is hoped, at least once the request for particulars in the Auditor's Claim has been responded to, that the intensive work to quantify, and particularise claims is largely completed and that remuneration should reduce going forward particularly as more proceedings are resolved.

Signed:

Witnessed by:



CONCLUDING REMARKS

424. For the reasons detailed in this Affidavit, I am of the view that the Orders sought by Mr Park in the Application are not in the best interests of members of the FMIF.

425. In the event that this Court dismisses the Liquidator's Application, I am in a position to consent to an appointment of me by the Court (on its own motion) as special purpose Liquidator of LMIM pursuant to s 90-15 of the *Insolvency Practice Schedule*. I believe that that would be the best way to ensure that the winding up of the FMIF proceeds in the most efficient and cost effective way going forward.

Legal Professional Privilege

426. In this Affidavit, I have referred to dealings with solicitors and Counsel in order to explain work undertaken for which I seek to be remunerated. I do not intend, in doing so, to waive any legal professional privilege that may attach to communications between me and my solicitors and Counsel.

427. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my affidavit.

Sworn by **DAVID WHYTE** on the 3rd day of December 2018 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase
Solicitor

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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 MANAGER 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

INDEX OF EXHIBITS

Volumes 1 to 3

No.	Index to "DW-126"	Date	Page No.
1.	Copy of David Whyte profile from BDO website	26.11.2018	1 - 3
2.	Replacement Constitution of LM First Mortgage Income Fund and variations thereto	10.04.2008; 16.05.2012; 26.10.2012	4 - 67
3.	Custody Agreement between LMIM and PTAL, together with the following relevant amendments:	04.02.1999	68 - 113
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