

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

AND

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

AND

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

Third Respondent: **ROGER SHOTTON**

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION**

STEPHEN CHARLES RUSSELL of Russells, Level 21, 300 Queen Street, Brisbane,
Queensland, states on oath:

1. I am a solicitor of this Honourable Court and Managing Partner of Russells,
the Solicitors for the First Respondent ("LMIM").

2. Now produced and shown to me and marked "SCR19" is an indexed and
paginated bundle of documents referred to in more detail in this my affidavit.

PAGE 1

Signed 


Solicitor/Barrister/Justice of the Peace

NINTH AFFIDAVIT OF STEPHEN CHARLES RUSSELL

Filed on behalf of the First Respondent

Form 46 Rule 431

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

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3. I am instructed, and believe it to be true, that FTI Consulting (Australia) Pty Limited ("FTI") was recently served with two subpoenas issued on behalf of the Applicants, namely:

(a) a subpoena dated 28 June, 2013, which was served after 6:00 pm on that date ("First FTI Subpoena") [Pages 6 to 10]; and

(b) a subpoena dated 1 July, 2013, which was served on that date, ("Second FTI Subpoena") [Pages 11 to 13].

4. I am also instructed, and believe it to be true, that the First Respondent was served with a subpoena issued on behalf of the Applicants, dated 1 July, 2013, on that date ("LMIM Subpoena") [Pages 14 to 17].

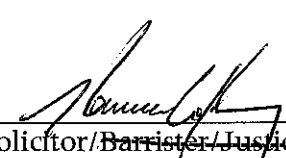
5. On Thursday, 4 July, 2013 I caused a letter dated 3 July, 2013 to be sent from Russells to Piper Alderman, regarding the First and Second FTI Subpoenas and the LMIM Subpoena ("Letter") [Pages 18 to 30].

6. Based upon instructions provided to me by Ms Ginette Muller, Mr John Corbett and Mr Andrew Weatherley of FTI, I believe the matters of fact set out in the Letter are true.

7. At the time of swearing this affidavit, no response to the Letter has been received (although in so saying, I intend no criticism of Piper Alderman).

PAGE 2

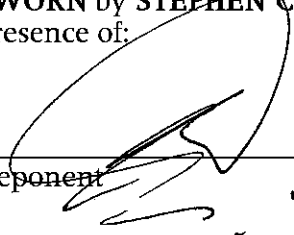
Signed


Solicitor/Barrister/Justice of the Peace


8. I am aware from the conduct of this proceeding, including from the numerous affidavits filed in the proceeding and the exhibits thereto, that Piper Alderman acts on behalf of Trilogy Funds Management Limited ("Trilogy") not merely in relation to this proceeding, but in respect of Trilogy's commercial campaign, since September, 2012, to replace LMIM is responsible entity of the LM First Mortgage Income Fund.

9. All the facts and circumstances 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 **STEPHEN CHARLES RUSSELL** on 4 July, 2013 at Brisbane in the presence of:



Deponent



Solicitor/~~Barrister~~/Justice of the Peace

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE

AND

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

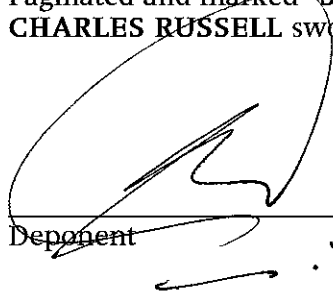
AND

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

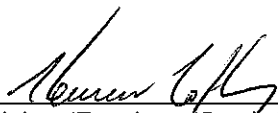
Third Respondent: ROGER SHOTTON

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION

Paginated and marked "SCR19" are the exhibits to the Affidavit of STEPHEN
CHARLES RUSSELL sworn 4 July, 2013:



Deponent



Solicitor/Barrister/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the First Respondent

Form 47 Rule 435

Russells
Level 21
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND
VICKI PATRICIA BRUCE

AND

First Respondent: LM INVESTMENT MANAGEMENT LIMITED
(ADMINISTRATORS APPOINTED)
ACN 077 208 461 IN ITS CAPACITY AS
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Second Respondents: THE MEMBERS OF THE LM FIRST
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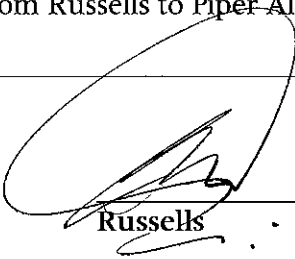
Third Respondent: ROGER SHOTTON

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS
COMMISSION

INDEX TO EXHIBIT "SCR19"

Doc No.	Description	Date	Page
1	Subpoena for Production directed to FTI Consulting (Australia) Pty Ltd ("First FTI Subpoena")	28.06.13	6 - 10
2	Subpoena for Production directed to FTI Consulting (Australia) Pty Ltd ("Second FTI Subpoena")	01.07.13	11 - 13
3	Subpoena for Production directed to LM Investment Management Limited (Administrators Appointed) ("LMIM Subpoena")	01.07.13	14 - 17
4	Letter from Russells to Piper Alderman	03.07.13	18 - 30

Signed:


Russells

Description:

Solicitors for the First Respondent

Dated:

4 July, 2013

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

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

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

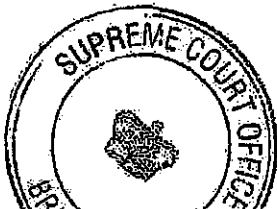
Second Respondent: **THE MEMBERS OF THE LM FIRST MORTGAGE
INCOME FUND, ARSN 089 343 288**

SUBPOENA FOR PRODUCTION

To: The Proper Officer, FTI Consulting (Australia) Pty Limited (FTI)
C/-Ginette Dawn Muller
22 Market Street
Brisbane QLD 4001

THE COURT ORDERS that you attend and produce this Subpoena and the documents and things described in the Schedule:

- (a) before the Supreme Court of Queensland;
- (b) at Queen Elisabeth II Courts of Law Complex, 415 George Street, Brisbane;
- (c) on 8 July 2013 at 10:00am and until you are excused from further attending.



Subpoena for Production
Filed on behalf of the Applicants
Form 41 Rule 415(1); 420

Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer
Place, SYDNEY 2000

Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900
Ref: AB:SP:384396

SCHEDULE

1. Any Documents relating or referring to investigations undertaken by FTI or any of its directors, employees, contractors or agents relating to possible claims against LM Investment Management Limited (Administrators Appointed), ACN 077 208 461 (LMIM) in its capacity as responsible entity of the LM First Mortgage Income Fund (the Fund) in the period 19 March 2013 to date.
2. Any Documents relating or referring to the engagement in November 2012 of Mr Niall Coburn by Trilogy Funds Management Limited (Trilogy) to undertake an investigation into LMIM.
3. Any Documents relating or referring to a meeting or meetings between and/or correspondence between Mr Lachlan McIntosh and Mr Damian Bender of FTI with Mr Michael Parker and Mr Greg MacDonald of LMIM in relation to LMIM.
4. Any Documents relating or referring to the possible appointment of FTI by Deutsche Bank as a Receiver in relation to the assets of the Fund.
5. All Documents (including but not limited to correspondence, including letters, emails, facsimile transmissions, memoranda, circulars and reports) in the period 1 March 2013 to 20 March 2013 between FTI and:
 - 5.1 Tony Hickey of Hickey Lawyers (or any other representative of Hickey Lawyers); and/or
 - 5.2 any directors, employees or representatives of LMIM

in relation to the pre appointment advice and conduct of FTI (or any of its representatives, employees, agents or contractors) relating to LMIM and/or the Fund.
6. All Documents (including but not limited to correspondence, including letters, emails, facsimile transmissions, memoranda, circulars and reports) in the period 1 March 2013 to date between FTI and:
 - 6.1 members of the Fund; and/or
 - 6.2 financial advisers of members of the Fund; and/or
 - 6.3 directors of LMIM; and/or
 - 6.4 representatives of the Australian and Securities and Investment Commission (ASIC) and/or;
 - 6.5 any journalist and/or
 - 6.6 Computershare Investor Services Pty Limited.

in relation to:

 - (a) the conduct of LMIM, its directors, officers, agents and employees regarding the Fund;

- (b) the conduct of the affairs of the Fund;
- (c) the investigation of any claims on behalf of the Fund against LMIM or its directors;
- (d) removing LMIM as responsible entity of the Fund;
- (e) replacing LMIM as responsible entity of the Fund with Trilogy;
- (f) the conduct of Trilogy in relation to the Fund;
- (g) the conduct of Piper Alderman in relation to the Fund; and
- (h) the meeting of members of the Fund convened by LMIM's administrators originally scheduled to occur on 30 May 2013 and held on 13 June 2013.

7. The "business advice" referred to in paragraph 13 of the affidavit of Ginette Dawn Muller sworn 2 May 2013 in these proceedings.
8. All Documents relating to any proposal for LMIM to enter into a deed of company arrangement in the period 19 March 2013 to date.
9. Any insurance policy held by LMIM, including but not limited to:-
 - 9.1 the insurance policies maintained pursuant to paragraph 22 of LMIM's Australian Financial Services Licence number 220281, including any schedules to those policies; and
 - 9.2 the insurance policies referred to at paragraph 31 of the affidavit of Ginette Muller, sworn 27 June 2013.
10. Copies of any notifications made by or on behalf of LMIM to its brokers and/or insurers under any of the insurance policies held or maintained by LMIM in the period 30 June 2012 to date.
11. The cash flow models referred to at paragraph 10 of the affidavit of John Damian Corbett, sworn 26 June 2013.
12. The valuations of properties referred to at paragraph 12 of the affidavit of John Damian Corbett, sworn 26 June 2013.
13. The strategic plans and cash flows prepared by FTI for the Fund and its assets as referred to in the affidavit (and exhibit "JCD1" thereto) of John Damian Corbett, sworn 26 June 2013.
14. The BIS Shrapnel report referred to at paragraph 2.5 of page 8 of the FTI report dated 7 June 2013 as contained in exhibit "JCD1" to the affidavit of John Damian Corbett, sworn 26 June 2013.

In this Subpoena:

Document – has the meaning given to it by s 36 of the Acts Interpretation Act 1954 (Qld) and includes any paper or other material on which there is writing; and any paper or other material on which there are marks, figures, symbols or perforations having a meaning for a person qualified to interpret them; any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device).

TAKE NOTICE:

1. failure to comply with this subpoena without lawful excuse is contempt of court and may result in your arrest.
2. you need not comply with this subpoena unless conduct money sufficient to meet your reasonable expenses of complying with the subpoena is paid, or tendered to you, not later than a reasonable time before the day on which you would be required to attend the Court.
3. you have the right to apply to the court to have the subpoena set aside on any sufficient grounds including -
 - want of relevance; or
 - privilege; or
 - oppressiveness, including oppressiveness because substantial expenses may not be reimbursed; or
 - non-compliance with the Uniform Civil Procedure Rules.
4. if you are not a party to these proceedings, instead of attending the court you or your agent may produce the documents and things described in the schedule to the Registry of the Court from which the subpoena was issued, not later than the day before the day on which you are required to attend.
5. if you are not a party to the proceeding and you incur substantial loss or expense in complying with this subpoena, you may apply to the Court for an order that the party who requested the issue of the subpoena pay to you an amount in addition to conduct money to compensate you for the loss or expense, including legal costs, incurred in responding properly to the subpoena.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND:


.....
Signed: [Signature and description of officer of the Court]

Dated 28 June 2013

Issued at the request of Amanda Kim Banton, the Applicants' solicitor.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

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


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

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

SUBPOENA FOR PRODUCTION

To: The Proper Officer, FTI Consulting (Australia) Pty Limited (FTI)
C/-Ginette Dawn Muller
22 Market Street
Brisbane QLD 4001

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Subpoena for Production
Filed on behalf of the Applicants
Form 41 Rule 415(1); 420

Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer
Place, SYDNEY 2000

Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900
Ref: AB:SP:384396

SCHEDULE

1. A narrative or narratives of the work undertaken in the schedule referred to at paragraph 89 of the affidavit of Ginette Dawn Muller, sworn 27 June 2013 (the **Muller Affidavit**) in these proceedings (and pages 330-332 of exhibit "GDM-15" thereto).
2. All Documents relating or referring to FTI's fees and/or expenses in relation to the LM First Mortgage Income Fund (the **Fund**), LM Investment Management Limited (Administrators Appointed), ACN 077 208 461 (**LMIM**) in its own right and LMIM, in its capacity as responsible entity of the Fund as referred to in paragraphs 47-49 of the Muller Affidavit, to include but not be limited to all Documents relating or referring to:
 - 2.1 FTI and/or LMIM's intention not to charge management fees in relation to the Fund;
 - 2.2 the fees and expenses of FTI and/or LMIM charged or proposed to be charged at insolvency practitioner rates in accordance with the Corporations Act 2001 or otherwise in relation to the Fund; and
 - 2.3 all Documents relating or referring to the fees and expenses of FTI and/or LMIM rendered in relation to the Fund in the period from 19 March 2013 to the date of production, including all Documents relating to the source of payment of such fees.

In this Subpoena:

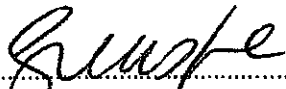
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3. you have the right to apply to the court to have the subpoena set aside on any sufficient grounds including -
 - want of relevance; or

- privilege; or
 - oppressiveness, including oppressiveness because substantial expenses may not be reimbursed; or
 - non-compliance with the Uniform Civil Procedure Rules.
4. if you are not a party to these proceedings, instead of attending the court you or your agent may produce the documents and things described in the schedule to the Registry of the Court from which the subpoena was issued, not later than the day before the day on which you are required to attend.
5. if you are not a party to the proceeding and you incur substantial loss or expense in complying with this subpoena, you may apply to the Court for an order that the party who requested the issue of the subpoena pay to you an amount in addition to conduct money to compensate you for the loss or expense, including legal costs, incurred in responding properly to the subpoena.

ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND:



.....
Signed: [Signature and description of officer of the Court]

Dated: 1 July 2013

Issued at the request of Amanda Kim Banton, the Applicants' solicitor.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/2013

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

First Respondent: **LM INVESTMENT MANAGEMENT LIMITED
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IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
LM FIRST MORTGAGE INCOME FUND
AND**

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

SUBPOENA FOR PRODUCTION

To: The Proper Officer, LM Investment Management Limited (Administrators Appointed), ACN 077 208 461
(LMIM)
Corporate Centre One
Level 9, 2 Corporate Court
Bundall QLD 4217

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Piper Alderman
Level 23, Governor Macquarie Tower, 1 Farrer
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Phone No: +61 2 9253 9999
Fax No: +61 2 9253 9900
Ref: AB:SP:384396

SCHEDULE

1. All Documents (including but not limited to correspondence, including letters, emails, facsimile transmissions, memoranda, circulars and reports) in the period 1 March 2013 to the date of production between LMIM (or any of its administrators, directors, employees, contractors or agents) and:

- 1.1 members of the LM First Mortgage Income Fund (the **Fund**); and/or
- 1.2 financial advisers of members of the Fund; and/or
- 1.3 FTI Consulting (Australia) Pty Limited (**FTI**), or any of FTI's directors, employees, contractors or agents; and/or
- 1.4 directors of LMIM; and/or
- 1.5 representatives of the Australian and Securities and Investment Commission (**ASIC**); and/or
- 1.6 any journalist; and/or
- 1.7 Computershare Investor Services Pty Limited,

in relation or referring to:

- (a) the conduct of LMIM, its directors, administrators, officers, agents and employees regarding the Fund;
- (b) the conduct of FTI (or any of its directors, employees, contractors or agents) regarding the Fund;
- (c) the conduct of the affairs of the Fund;
- (d) the investigation of any claims on behalf of the Fund against LMIM or its directors;
- (e) removing LMIM as responsible entity of the Fund;
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3. you have the right to apply to the court to have the subpoena set aside on any sufficient grounds including -
- want of relevance; or
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ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND:


.....
Signed: [Signature and description of officer of the Court]

Dated: 1 July 2013

Issued at the request of Amanda Kim Banton, the Applicants' solicitor.

Ilenna Copley

From: Stephen Russell
Sent: Thursday, 4 July 2013 12:30 AM
To: Amanda Banton
Cc: Ilenna Copley; Anne Freeman
Subject: LMIM and others ats Bruce and another
Attachments: scr_20130471_255.pdf

Saved: -1

Dear Ms Banton

Please see attached correspondence concerning the subpoenas that you have issued and served.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

Direct (07) 3004 8810
Mobile 0418 392 015
SRussell@RussellsLaw.com.au

Liability limited by a scheme approved under professional standards legislation

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899 / ABN 38 332 782 534
RussellsLaw.com.au

RUSSELLS

3 July, 2013

Our Ref: Mr Russell/Ms Copley
Your Ref: Ms Banton

EMAIL TRANSMISSION

Ms Amanda Banton
Piper Alderman
SYDNEY

email: ABanton@piperalderman.com.au

Dear Ms Banton

**LM Investment Management Limited (Administrators Appointed) ("LMIM")
and others –as- Bruce and Anor
FTI Consulting (Australia) Pty Ltd ("FTI")
Supreme Court of Queensland Proceeding 3383 of 2013**

We refer to the two subpoenas that have been served on FTI and another in similar, but not identical terms, served on the First Respondent, LMIM. We have been retained to act for FTI in relation to the subpoenas issued to it.

One Subpoena to FTI was issued on 28 June, 2013 and served after 6.00pm that night; and the other was served on 1 July. The subpoena to LMIM was also issued and served on 1 July, 2013.

We will call these Subpoenas "FTI Subpoena 1", "FTI Subpoena 2" and "LMIM Subpoena", respectively.

Our clients take the view that all three subpoenas are irregular to the point of invalidity; and also an abuse of process, in the particular context of the orders and directions for the management of these proceedings.

The purposes of this (regrettably very long) letter are, however, to endeavour to minimise the costs that will be incurred not only by FTI and LMIM but also ultimately by the applicants, in responding to the subpoenas; and to suggest practical solutions to these difficulties so that the trial can proceed.

Accordingly, we are instructed to explain our clients' reasons for regarding the subpoenas as invalid, and also to suggest alternative means whereby the documents that are apparently relevant, and could either have been the subject of a subpoena for production at the hearing, or some other regular process (such as a Notice UCPR 222) may be produced and inspected by agreement – even in advance of the hearing.

This letter is, however, without prejudice to our clients' contentions that the subpoenas should be set aside.

Liability limited by a scheme approved under professional standards legislation

Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 21, 300 Queen Street, Brisbane QLD 4000
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899

RussellsLaw.com.au

scr_20130471_255.docm

Subpoena to FTI

We doubt that documents of the administrators are in the possession or power of FTI. The appointment of administrators is a personal one.

However, we have not investigated this in any detail because we are instructed that, in order to save costs and focus on a practical resolution of the difficulties created by your conduct, the administrators will treat the subpoenas issued to FTI as also naming them as respondents to it.

The administrators and FTI also waive service of an amended (or another) subpoena.

In so saying, however, our clients do not waive the objection that the subpoenas are an impermissible attempt to obtain disclosure from non-parties; or indeed any of the other numerous defects, as to which, see below.

Subpoena not returnable at hearing

The hearing of the Originating Application is listed for 15 July, 2013. The subpoenas all purport to require FTI and LMIM to produce the documents in court on 8 July, 2013. Not only is that not the trial date, there is no hearing at all in this proceeding, listed on that date.

As you may be aware there is clear authority in Queensland for the proposition that subpoenas cannot be issued in such proceedings in those circumstances.

We are not privy to what passed between your firm and the Registrar when you applied for the issue of the three Subpoenas, and our clients reserve their rights in respect of these communications. Please advise what you communicated to the Registrar when applying for the issue of these subpoenas.

We are aware of a practice in the Supreme Court of New South Wales, whereby subpoenas are commonly issued returnable prior to the trial or other hearing. That process appears to be the equivalent of the Queensland Notice of Non-Party Disclosure.

In this court, however, both the rules and procedure are different.

Subpoenas contrary to directions and case management to date

We will not rehearse the various steps – and, importantly, the timing of those steps – that your firm and your various clients have taken in the course of these proceedings. It is sufficient, for present purposes, to record our contention that your firm has deliberately prosecuted these proceedings in a way designed to maximise the inconvenience and cost to our client and indeed the other parties; and to afford them the least time possible within which to respond to your firm's various steps.

As at 7 May, 2013, the proceedings were due to be heard on 13 May, 2013. On that date, subpoenas for production issued by or clients were also extant.

On that date, owing to very late service of completely unheralded affidavits by the Applicants, our clients applied for and obtained an adjournment of the trial. The contested application on that day occupied the entire day and resulted in details directions, all designed for the orderly conduct of the proceedings up to the first day of a three day trial, commencing on Monday, 15 July, 2013.

Neither to Peter Lyons J on that occasion, nor when discussing the directions with us and the other parties following that hearing, did you mention your intention to issue these subpoenas. The subpoenas seek the production of two broad categories of documents – those that are referred to in the affidavits served by LMIM last week and others not referred to therein.

Although the relevance of many of the documents in the second category is very obscure, all such documents appear to relate to issues or topics of controversy well known to your clients and your firm at the outset of these proceedings.

There seems to us to be simply no justification for the applicants and your firm holding back the issue of these subpoenas from the outset; particularly taking into account the proceedings at the hearing on 7 May, 2013, and the directions may thereafter.

If the subpoenas required (or purported to require) the production of one or a few documents, then the prejudice arising from this feature of subpoenas would not be as acute as it is. However, as we shall mention, the subpoenas are extraordinarily wide.

These subpoenas are evidently directed at requiring disclosure (discovery in the old language) both from a party and a non-party, as opposed to seeking the production of identified documents that are known to exist and can be described with precision. This exacerbates the abuse of the process of the court involved in issuing these subpoenas, returnable on 8 July, and not at the trial.

Oppression from width of description of documents

Firstly, as just mentioned, FTI Subpoena 1 (save for documents 10 to 14), FTI Subpoena 2 and the LMIM subpoena (save for documents 2 and 6 to 9) effectively seek disclosure. In our view, this is not permissible in a proceeding where the Applicants have elected to proceed by way of Originating Application.

Secondly, the following parts of the Subpoenas contain descriptions that are oppressively wide. A Respondent to a subpoena is entitled to know with precision precisely the ambit of the document which he must produce, at peril (as the subpoenas say) of punishment for contempt of court.

The use of the expression “relating or referring to [various topics]” offends this basic principle. No one reading those descriptions can know the limit of the documents intended to be the subject of the requirement of production. (In some cases, that vice results not only from the use of the expression “relating or referring to [various topics]”, but also from the width of the expressions used.

Subpoena	Offending paragraphs in Schedules (“relating to or referring to”)
FTI Subpoena 1	1, 2, 3, 4, 8
FTI Subpoena 2	2
LMIM Subpoena	1, 3

The following table lists other categories of documents, the description of which, while not directed at documents “relating to or referring to”, is oppressively wide on its face:-

Subpoena

FTI Subpoena 1

**Offending paragraphs in Schedules –
description otherwise oppressively wide**

5, 6

Oppression – work required to distract the various documents

Firstly, the generality of the description of the documents mentioned in the table above – by the use of the expression “documents relating or referring to” – itself gives rise to oppression because both FTI and LMIM hold vast numbers of documents maintained by their respective very large staffs of employees.

That is, in addition to being too wide on its face, each subpoena is oppressive in its effect. This objection relates to the categories of documents identified in the two tables above.

A couple of examples will suffice. Document 6 in the FTI Subpoena 1 will require FTI to search literally its entire database and look at literally every document in order to see:-

1. Whether, firstly, the document is a document that passed between it and one of the six categories of people mentioned in paragraphs 6.1 to 6.2;
2. Secondly, whether the document falls within the date period mentioned;
3. Thirdly, whether the document relates to (or, in the language of item 1 of the schedule to the LMIM subpoena relates or refers to) one of the eight topics (each expressed very widely) in sub-paragraphs (a) to (h).

It is quite obvious that little or no care went into drafting the subpoenas with a view to catching the documents that may actually be sought for the hearing scheduled to commence on 15 July.

For example, an email from Ms Muller of FTI to Ms Gubbins of ASIC to the effect that she would meet her at the Meeting of Members the following day would be caught by sub-paragraphs 6.4 and (h) of FTI Subpoena 1. Equally, a covering letter from Ms Lobb of FTI to say, Ms Mulder, a director of LMIM, to the effect that the interim distribution should proceed would also be caught by sub-paragraphs 6.3 and (g) of FTI Subpoena 1.

But neither document would have the slightest relevance to anything that is being litigated in these proceedings.

It is not without relevance that your clients are New Zealand citizens, resident on the South Island of New Zealand. It is more than doubtful that they have the resources to pay the costs of such an extensive search.

However, whilst both the costs of the extensive search and the Applicants' ability to pay them are relevant to this ground of objection, the principal basis of the of the objection, is the oppressiveness of the search itself. As you will appreciate from Ms Muller's affidavit sworn on 27 June, 2013, she sets out the issues, so far as she (and we) are able to perceive them.

This oppressiveness is exacerbated by the other factors mentioned above and below.

Insufficient time to comply

The table below sets out those documents in the various subpoenas that are not in the nature of a notice to produce a document referred to in an affidavit:-

Subpoena	Offending paragraphs
FTI Subpoena 1	1, 2, 3, 4, 5, 6, 8, 9, 10
FTI Subpoena 2	1, 2
LMIM Subpoena	1, 3, 4, 5

All of the documents described in those paragraphs of those subpoenas appear to us to relate to issues, matters or topics of which your client, Trilogy, and your firm have been well aware for many months, including in the period of time prior to the Applicants instituting these proceedings.

We cannot imagine any good reason for holding back these subpoenas until this very late stage - well after all of the evidence should have been filed - but we invite you to explain this delay.

Why was leave not sought much earlier to issue such subpoenas?

Following receipt of the subpoenas on 1 July, 2013, our clients immediately assigned three staff to investigate the task of complying with the subpoenas. Even that job has not been completed but, as at 9.30 pm tonight, our instructions may be summarised as follows:-

- To date, we have identified at least 4,099 documents emanating from FTI that will need to be examined to determine whether they are caught by paragraph 6 of the Schedule to FTI subpoena 1. We have no doubt more will emerge.
- That does not include similar documents held by LMIM (to respond to document 1 in the Schedule to the LMIM Subpoena).
- Given the significantly wide scope of the subpoenas, in order to comply with them in their entirety, the following process will need to be undertaken:
 - Review of all emails and documents held by 30 FTI staff who have worked and recorded time on MIF.
 - Review of all emails and documents held by 66 FTI staff who have worked and recorded time on LMIM.
 - Review of all emails and documents held by 38 FTI staff who have worked on and recorded time on LMA providing services to LMIM.
 - Review of all emails and documents held by 115 LMA staff who provided services to LMIM, who may have had dealings with MIF.

-
- FTI staff to conduct full review of approximately 35 folders of hard copy documents held.
 - FTI staff to conduct full review of the relevant server files (3 folders with 7,307 files - at 3 July 13).
 - LMIM or FTI staff searching through hard copy records held on LM site (unknown quantum).
 - LMIM or FTI staff liaising with numerous contractors and agents in relation to documents held.
 - Conduct full review of LMIM servers (49 servers with 100 Terabytes of unpacked data) to identify relevant documents.
 - Obtain advice on documents identified to ascertain whether the documents are subject to privilege; and to determine relevance where there is any doubt.
- The LMIM and LMA folders will contain documents that relate to MIF, MPF, other funds, and correspondence with the parties listed (that is these documents are not always separated) so a full review will be necessary.
 - Given the likely volume and size of documents that this process will identify, it is estimated that the task will take three to four weeks, subject to the availability of relevant staff, contractors and agents to conduct searches and provide documents. This timeframe excludes:-
 - the time required to copy the documents (noting one document passing between FTI and Computershare is over 58,000 pages) and
 - the time necessary for legal advisors to review and advise on the matters just mentioned (privilege and relevance).

In short, there is simply insufficient time to comply with the subpoenas.

Most of the documents are irrelevant or of very doubtful relevance

In the table below, we summarise the reasons for our clients' contentions that the following documents or classes of documents are either completely irrelevant, or of very doubtful relevance to the matters to be litigated at the trial on 15 July, 2013.

In short, the attempt to obtain documents or classes of documents mentioned below is, in every case, a classic fishing expedition.

This is intended to be a summary only and is not intended to be exhaustive.

Accordingly, in respect of each document or category mentioned below, we ask that you refine – or rephrase – the description so as to identify what it is you seek to obtain, and explain how the document(s) really sought will be relevant to the proper disposition of the case – as opposed to merely fishing for a case at the last minute. If you will do so, we will take instructions immediately with a

view to resolving the dispute, and avoiding an application to set aside the subpoenas.

Doc	Irrelevant Because
FTI Subpoena 1	
1	<p>As we understand the Applicants' case, they contend that conflicts exist between the interests of members and the interests of creditors of LMIM so acute as to justify replacement of LMIM with another Responsible entity. No basis is laid for these assertions. Nonetheless, Ms Muller deals more fully with a description of these conflicts, as far as LMIM and we are able to understand them, in paragraph 6 and following of her affidavit of 27 June, 2013.</p> <p>We pause to mention the impossible width of the description of the documents in this item. The expression "possible claims against" LMIM is wide enough to catch proofs of debt lodged at the first meeting of creditors. So, all proofs of debt would be caught, as would notes in relation to those proofs, the register of creditors who attended the meeting, the minutes of the meeting and so on.</p> <p>No attempt is made to identify the claimants in respect of the "possible claims". No attempt is made to describe the claims. Nor is any attempt made to limit the character of the documents that are sought. Accordingly, FTI would have to review its entire database in relation to LMIM to look for and review every email in relation to LMIM, sent or received by all of FTI's directors, employees, contractors and agents, and see whether those emails "relate or refer to" investigations relating to "possible claims".</p> <p>Assume that there are some, many or a great many such "Documents". Of what use could such "Documents" be in the disposition of the litigation?</p> <p>Assume, alternatively, that there are no such "Documents". How will that assist the disposition of the litigation?</p> <p>The resolution of the question of whether the alleged conflicts exist and, if they do, whether they are sufficiently acute to justify replacement of LMIM with Trilogy is not assisted by establishing that such investigations have or have not been carried out, the nature and content of such investigations, or the results of them.</p>
2	<p>We confess to being completely unable to understand the relevance or probity of any such documents, much less the need for compulsory production of documents, given that your client Trilogy must have many of them in its possession.</p> <p>Mr Coburn is now employed by FTI. He is, we are instructed, a former officer of ASIC who, while there, looked into the affairs of LMIM. After leaving ASIC, he was engaged by your client Trilogy, to assist it with its campaign to take over the LM Investment Management Funds.</p> <p>Our clients do not know what information Mr Coburn obtained while at ASIC or Trilogy. He has, naturally, neither been asked about, nor given any information about those matters, and has had nothing to do with the administration of LMIM.</p>

Doc	Irrelevant Because
	Again, any such documents that may exist cannot be relevant.
3, 5	There is no issue raised by your clients' evidence, or that of any other party, that would make such documents, if they exist, relevant.
4	<p>This an exemplification of the purest and most speculative fishing.</p> <p>Again, there is no issue raised by your clients' evidence, or that of any other party, that would make such documents, if they exist, relevant.</p>
6	<p>This are impossibly wide classes of documents and are pure fishing. There are 48 categories of documents.</p> <p>How, one asks, could it assist your clients' case to know what Ms Muller has written to the directors of LMIM about your firm's conduct?</p> <p>How, one asks, could it assist your clients' case to what the directors of LMIM have written to FTI about the conduct of Trilogy in relation to the Fund?</p> <p>How, one asks, could it assist your clients' case to know what a particular financial advisor has written to FTI about the meeting of members held on 13 June?</p>
8	Again, there is no issue raised by your clients' evidence, or that of any other party, that would make such documents, if they exist, relevant.
9, 10	<p>Your firm is acting for some members of the Fund. Before it was mentioned in evidence in these proceedings (to demonstrate the hypocrisy on which Daubney J commented) your website contained advertising material in which you claim to represent "acts for a major portion of the unit holders [in The FMI Fund] by value".</p> <p>Your Ms Banton has, in discussions with Mr Park of FTI, asked to see the insurance policies in relation to this "class action".</p> <p>Your firm's use of this subpoena to seek to obtain these documents (for the benefit of Trilogy and your other litigation clients) is improper.</p> <p>And, there is no issue raised by your clients' evidence, or that of any other party, that would make the amount or terms of the insurance cover, or any notifications to the insurer(s) if they exist, relevant.</p>
FTI Subpoena 2	
1	<p>Again, there is no issue raised by your clients' evidence, or that of any other party, that would make such documents, if they exist, relevant.</p> <p>This is another good example of the oppressive over-reach of this very late subpoena.</p> <p>Ms Muller has mentioned, in her affidavit, that a lot of work has been done. She has described the work in general terms. She has referred to documents from Trilogy that show what it has said it intends to do, should it become RE of this Fund. She has explained that much of the work that she and her staff have done would have to be re-done if LMIM ceases to be RE – no matter who replaces it – or if other</p>

Doc	Irrelevant Because
	<p>insolvency practitioners are appointed.</p> <p>We take these matters to be uncontroversial. One would expect nothing less from administrators of a MIS with such a large and diverse capital base; and (in relation to the probability of duplication) because of the duty of trustees or fiduciaries to bring independent judgment to bear.</p> <p>Ms Muller's affidavit also puts a figure on the work that she and her staff have done, at standard FTI rates.</p> <p>However, neither this evidence, nor any submission that our client could or will make based on it, involves any contention about the details of the work; or that LMIM, or the Fund is liable for any part of these cost figurings. On the contrary, Ms Muller swears (and it is the law anyway) that any claim for remuneration will be dealt with by creditors or the court.</p> <p>How, one asks, will it assist the Applicants in showing, for example, that Mr Corbett has spent 15 or 150 hours working on detailed cash flow analyses for all underlying assets; or (for example) that an FTI manager devoted 15 minutes on 28 May, talking to a planning officer at the Redland City Council about the progress of a planning application?</p> <p>Therefore, there is no issue in the case that could be assisted by the production of detailed narratives of the work that Ms Muller has broadly described.</p>
2	<p>The comments just made apply equally to this category.</p> <p>Moreover, the language is unclear. Rather than argue about paragraph 2.1, we are instructed to say that the only documents that exists in the hands of FTI, that answer the description in this paragraph are a file note of the conversation with Mr Tucker on 23 April, and Ms Muller's affidavit.</p> <p>Paragraph 2.2 seeks the same documents as paragraph 1, and is consequently bad.</p> <p>Paragraph 2.3 is incomprehensible and illustrates the carelessness that pervades all subpoenas. FTI does not have, and has not claimed "fees and expenses". Nor has it "rendered" any "fees and expenses". Nor has LMIM "rendered" any "fees and expenses". Nor are there any Documents "relating to the source of payment of such fees" (but not expenses?)</p> <p>Even if such documents existed, there is no issue in the case that could be assisted by the production of any such documents.</p>
LMIM Subpoena	
1	<p>The description of this category of documents is similar, but not identical to paragraph 6 of the FTI Subpoena 1. The same comments apply, although there are 63 (not 48) categories of documents here.</p> <p>We observe that the addition of paragraph 1.3, and the retention of paragraph 1.4 show that this subpoena is a thoughtless reproduction of</p>

Doc	Irrelevant Because
	<p>the FTI Subpoena 1. This drafting creates the absurdity that it seeks production of communications between LMIM and directors of LMIM – while it is in administration.</p> <p>A further topic sub-paragraph has also been added – sub-paragraph (b), to produce the absurdity that the subpoena actually seeks communications between the administrators of LMIM and FTI’s directors concerning the conduct of FTI regarding the Fund.</p>
3	This is a repeat of paragraph 8 of FTI Subpoena 1, so that again, there is no issue raised by your clients’ evidence, or that of any other party, that would make such documents, if they exist, relevant.
4, 5	This is a repeat of paragraphs 9 and 10 of FTI Subpoena 1, so that again, there is no issue raised by your clients’ evidence, or that of any other party, that would make the amount or terms of the insurance cover, or any notifications to the insurer(s) if they exist, relevant.

Documents referred to in affidavits

The correct procedure to seek production of documents referred to in affidavits is the simple Notice for which UCPR 222 provides.

Again, in the interests of economy, LMIM is willing to treat your subpoenas as such notices and, subject to an appropriate confidentiality regime, to produce such documents for your inspection. The documents in paragraphs 11 to 14 of FTI Subpoena 1, and paragraphs 6 to 9 of the LMIM Subpoena are, variously, strictly confidential, price sensitive, highly commercially sensitive and the subject of copyright and other intellectual property interests of the administrators and FTI.

Publication of those documents in open court may result in serious commercial damage to the members of the FMI Fund, by, for example, disclosing prices, and values, that a vendor would never be willing to disclose to potential purchasers (of which Trilogy is one) and that a business person would never disclose to its competitors (of which Trilogy is one). The work product and expertise of the administrators and FTI that reside in the cash flows, strategy documents and the like are in the same category.

(The position is different in relation to documents relating to insurance cover, because the affidavits do not refer to any such documents in a way that would permit the giving of a Notice under UCPR 222 – see *Balnaves v Smith*. The documents are not offered for inspection, and our clients’ objection to the subpoenas is set out above.)

Therefore, the fact that your firm also acts for Trilogy presents great practical difficulties. If it was merely indemnifying the Applicants as a litigation funder, the position may not be so acute. It is clear that its officers are your principal instructors, and that it is, in a real and direct sense, the principal beneficiary of the litigation. Mr Wood’s affidavit is a substantial body of evidence for the Applicants.

It is also clear that your Ms Banton, and no doubt other members and employees of your firm, have had a very close relationship with Trilogy, going back many months, if not longer.

We and our clients are not much enamoured of the Chinese Wall theory. Misadventures in Chinese Wall cases are becoming all too common. (See, e.g. *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*) However, our clients are willing, again in the interests of economy, to seek to agree a regime that will permit your firm to continue to act in the proceedings for the Applicants, and inspect the documents that must not be shown to your other client, Trilogy.

Accordingly, our clients suggest that your firm gives the following undertakings to the court in respect of documents in paragraphs 11 to 14 of FTI Subpoena 1 before they are produced for your inspection; namely that, pending further order your firm will:-

1. Not disclose the documents or their contents or any part thereof to any officer, employee or agent of Trilogy, or to any solicitor in your firm who has had any prior contact with any officer or employee of Trilogy;
2. Not use the documents produced for any purpose other than the prosecution of these proceedings;
3. Depute, to inspect the documents, and receive any copies requested ("the original copies"), only a solicitor who has had no prior contact with any officer or employee of Trilogy;
4. Confine the distribution of the original copies and any copies of the original copies ("secondary copies") to the following persons, who shall firstly sign and file undertakings to like effect:-
 - (a) counsel engaged to appear for the Applicants;
 - (b) any other solicitor in your firm engaged in this matter from time to time, not being a solicitor who has had prior contact with any officer or employee of Trilogy;
 - (c) any expert witness (not being an officer or employee of Trilogy) engaged to assist the Applicants in the proceedings;
5. To record the number of secondary copies made, and the persons to whom they are given;
6. To provide such record to the solicitors for the First Respondent on request;
7. To keep the original copies and secondary copies securely, so that they cannot be inspected by unauthorised persons;
8. To return the original copies and all secondary copies, and to provide a copy of the said record, to the solicitors for the First Respondent following the final determination of these proceedings.

We apologise that this is such a long letter, but we think it will illustrate the difficulties from which your subpoenas suffer.

We seek your immediate assurance that you will not attempt to call on the subpoenas on 8 July. And we ask you to let us know, by the close of business tomorrow today (4 July) whether you agree to our requests to confine the

attempt to see our clients' documents only to those particular documents that are undoubtedly relevant and probative of an issue that will really be litigated.

In those events, we need not file any application to set aside the subpoenas.

However, if these matters cannot be resolved by agreement, and very promptly, our clients will of course be obliged to file such applications.

Yours faithfully



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