

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

CERTIFICATE OF EXHIBIT

VOLUME 2 OF 3

Exhibit "DW-126" (pages 206 – 398) to the Affidavit of DAVID WHYTE sworn this 3<sup>rd</sup> day of December 2018



Deponent



Solicitor/A Justice of the Peace

Alexander Philip Nase  
Solicitor



CERTIFICATE OF EXHIBIT:

Form 47, R.435

Filed on behalf of the Respondent  
Mr David Whyte

Document1

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

**SUPREME COURT OF QUEENSLAND**

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<b>BORROWER</b>	<b>BDO</b>	<b>MGN</b>
<b>New South Wales</b>		
Glendenning Developments Pty Ltd		\$889,253.66
Green Square Property Developments		\$802,132.51
Greystanes Projects Pty Ltd		\$7,819,456.05
Lot 111 Pty Ltd.		\$8,175,102.24
Madrers Properties Pty Ltd		\$414,712.00
Ovst Pty Ltd (DMF) Acc. 100221373	\$16,135,436.50	
OVST Pty Ltd (Stage 2) Acc. 100185016		
<b>Queensland</b>		
Brambleton Pty Ltd		\$3,732,247.00
Carrington Management Pty Ltd (Caboolture)	\$6,755,879.79	
LMIM atf LM Managed Perf Fund (Bushland Beach)		\$1,334,840.91
Northshore Bayview St Pty Ltd		\$10,348,796.40
Redland Bay Leisure Life Development (Petrac)	\$29,216,167.30	
Source Student Lodge Pty Ltd		\$152,007.00
Source Developments Pty Ltd		\$11,573,652.72
St Crispin's Property Pty Ltd		\$8,262,604.01
Tall Trees Tanah Merah (Living Concepts) Pty Ltd (UPD)	\$7,500,300.00	
Townsville Commercial Pty Ltd IOR		\$157,678.62
Young Land Corporation (Yeppoon)		\$2,152,613.00
<b>Victoria</b>		
Bridgewater Lake Estate Ltd	\$6,835,921.41	
U-Own Storage (Southbank) Pty Ltd		\$642,489.00
<b>Australian Capital Territory</b>		
AIIS Pty Ltd & Space Developments Pty Ltd	\$3,722,335.32	

<b>BORROWER</b>	<b>BDO</b>	<b>MGN</b>
<b>Western Australia</b>		
Coulter Developments		\$322,399.35
Kingopen P/L		\$4,170,614.40
<b>Tasmania</b>		
Cameo Estates P/I	\$2,121,663.65	
	<b>\$72,287,703.97</b>	<b>\$60,950,598.87</b>

# Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz

16 November 2018

Your reference:

HWL Ebsworth Lawyers  
Level 19, 480 Queen Street  
Brisbane Qld 4000

Email: dofarrell@hwle.com.au

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
John Park and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015

We act for Mr David Whyte, the court appointed receiver of the LM First Mortgage Income Fund, in the above proceeding.

We understand that you act for Mr Said Jahani in his capacity as receiver and manager of the LM Currency Protected Australian Income Fund (CPAIF) and the LM Institutional Currency Protected Australian Income Fund (ICPAIF). We note that the CPAIF and the ICPAIF, together hold a total of 27% percent of the units in the FMIF.

On 10 October 2018, Mr John Park, the Liquidator of LMIM, filed an application (the Application) in Supreme Court of Queensland Proceeding 3508/15 seeking orders, among other things, to the following effect:-

1. Directions in relation to the dual appointments of Mr Park (the Liquidator) and Mr David Whyte (the Receiver) to wind up the FMIF, including that Mr Whyte's appointment to supervise the winding up of the FMIF continue only in relation to the "Clear Accounts Proceeding" (SC 11560/2016), the "Feeder Fund Proceeding" (SC 13534 of 2016) and the "EY Proceeding" (SC 2166/2015), and the Liquidator take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
2. That the Liquidator is directed to act as contradictor to the Clear Accounts Proceeding (Supreme Court of Queensland No 11560/2016) and the Feeder Fund Proceeding (Supreme Court of Queensland No 13534 of 2016);
3. That the Liquidator and Receiver each submit a budget of remuneration and expenses to the conclusion of the winding up of the FMIF, that the remuneration of the Liquidator and the Receiver be fixed or determined on the hearing of the application in the amount of 50% of the amount of stated in the relevant Budget, and paid during the course of the winding up, with all other remuneration and expenses of the Liquidator and the Receiver to be deferred and sought at the conclusion of the winding up at which time the amounts stated in the Budgets can be reduced, increased or stay the same;
4. That the costs of the Application be paid from the FMIF and other funds in such proportions as may be just.

Principals.  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Dawey.

Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.  
Marcelle Webster.

Associates.  
Emily Anderson.  
James Morgan.  
Scott Hornsey.  
Robert Tooth.  
Paul Armit.  
Wesley Hill.

A copy of the Application is **attached**. Our client considers it appropriate to provide your client with a copy of this Application because the orders sought include orders which would appoint Mr Park as a further contradictor in the Feeder Fund Proceeding, although we understand that your client has not been formally served with a copy of the Application.

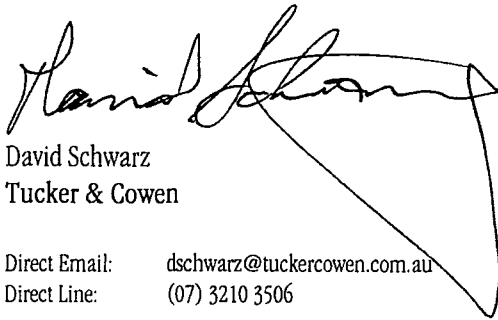
The Application is set down for a directions hearing on 19 November 2018 and for a final hearing provisionally on 10 December 2018, in the Supreme Court of Queensland.

The effect of the directions sought in the Application, if granted, would be, among other things, to discharge Mr Whyte's appointment in part, to limit funding available for the conduct of the winding up, to hand control of the winding up (other than certain specified legal proceedings) to the Liquidator, and, subject to the retirement of the receivers appointed by Deutsche Bank AG, to hand control of the bank accounts of the FMIF to the Liquidator.

We would be grateful if you would let us know your client's attitude in relation to the Application.

If you have any queries or wish to discuss the matter, please do not hesitate to contact us.

Yours faithfully



David Schwarz  
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au  
Direct Line: (07) 3210 3506

Encl.

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Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

16 November 2018

Your reference: Ms Banton / Ms Goodman

Principals.  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Davey.

Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.  
Marcelle Webster.

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Squire Patton Boggs (AU)  
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Sydney NSW 2000

Email: amanda.banton@squirepb.com  
susan.goodman@squirepb.com

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
John Park and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015

We act for Mr David Whyte, the court appointed Receiver of the LM First Mortgage Income Fund, in the above proceeding.

We understand that you act for Trilogy. We note that the LM Wholesale First Mortgage Income Fund, of which Trilogy is the sole unitholder, holds approximately 21% of the units in the FMIF.

On 10 October 2018, Mr John Park, the Liquidator of LMIM, filed an application (the Application) in Supreme Court of Queensland Proceeding 3508/15 seeking orders, among other things, to the following effect:-

1. Directions in relation to the dual appointments of Mr Park (the Liquidator) and Mr David Whyte (the Receiver) to wind up the FMIF, including that Mr Whyte's appointment to supervise the winding up of the FMIF continue only in relation to the "Clear Accounts Proceeding" (SC 11560/2016), the "Feeder Fund Proceeding" (SC 13534 of 2016) and the "EY Proceeding" (SC 2166/2015), and the Liquidator take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
2. That the Liquidator is directed to act as contradictor to the Clear Accounts Proceeding (Supreme Court of Queensland No 11560/2016) and the Feeder Fund Proceeding (Supreme Court of Queensland No 13534 of 2016);
3. That the Liquidator and Receiver each submit a budget of remuneration and expenses to the conclusion of the winding up of the FMIF, that the remuneration of the Liquidator and the Receiver be fixed or determined on the hearing of the application in the amount of 50% of the amount of stated in the relevant Budget, and paid during the course of the winding up, with all other remuneration and expenses of the Liquidator and the Receiver to be deferred and sought at the conclusion of the winding up at which time the amounts stated in the Budgets can be reduced, increased or stay the same;
4. That the costs of the Application be paid from the FMIF and other funds in such proportions as may be just.

A copy of the Application is attached. Our client considers it appropriate to provide your client with a copy of this Application because the orders sought include orders which would appoint Mr Park as a further contradictor in the Feeder Fund Proceeding, although we understand that your client has not been formally served with a copy of the Application.

The Application is set down for a directions hearing on 19 November 2018 and for a final hearing provisionally on 10 December 2018, in the Supreme Court of Queensland.

The effect of the directions sought in the Application, if granted, would be, among other things, to discharge Mr Whyte's appointment in part, to limit funding available for the conduct of the winding up, to hand control of the winding up (other than certain specified legal proceedings) to the Liquidator, and, subject to the retirement of the receivers appointed by Deutsche Bank AG, to hand control of the bank accounts of the FMIF to the Liquidator.

We would be grateful if you would let us know your client's attitude in relation to the Application.

If you have any queries or wish to discuss the matter, please do not hesitate to contact us.

Yours faithfully



David Schwarz  
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au  
Direct Line: (07) 3210 3506

Encl.

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## David Schwarz

---

**From:** Hugh Copley <Hugh.Copley@asic.gov.au>  
**Sent:** Friday, 16 November 2018 1:13 PM  
**To:** jwalsh@russellslaw.com.au; Ashley Tiplady; David Schwarz  
**Cc:** Patricia Hu; Carl Sibilia  
**Subject:** In the Matter of LM Investment Management Limited (in Liquidation)  
(Receivers Appointed) [BS3508/2015] [SEC=UNCLASSIFIED]

Dear Sirs,

I refer to the application in the above proceeding, which I note is returnable (for directions) on 19 November 2018 (**the Application**). I refer also to the affidavit of Mr Park (sworn 10 November) which was served upon ASIC on 12 November.

I am instructed to advise that ASIC will not be appearing at the hearing on 19 November, nor are there any particular directions that ASIC might ask be made at that hearing. Can the parties please provide ASIC with any orders arising from the 19 November hearing and any further material sought to be relied upon?

As to the final determination of the Application, I am instructed 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 and/or the creditors of the LM Group of companies, by seeking the costs associated with any such involvement.

With these instructions in mind, ASIC is anxious to understand what, if any, assistance it might be able to provide to the Court on the Application. In this regard, can Russells please respond to the following matters, which spring to mind having reviewed the Application and Mr Park's affidavit?

First, why does Mr Park assert that Justice Dalton's orders – appointing Mr Whyte to take responsibility for winding up the FMIF – should be revisited and/or be limited in the manner contemplated by the Application? Is it simply that "the potential conflicts identified by Dalton J ... no longer exists", which appears to be the thrust of paragraphs 1 and 6(a) of the Finalisation Strategy identified in the Russells letter of 3 October 2018?

Second, the Russells letter of 3 October does not appear to traverse Mr Whyte's 'proposal' contained in the Tucker & Cowen letter of 27 September, save by enunciating the Finalisation Strategy which appears to be the subject of the Application. What is Mr Park's position in respect of Mr Whyte's proposal?

Yours sincerely,

**Hugh Copley**

Litigation Counsel Qld, Chief Legal Office

**Australian Securities and Investments Commission**

Level 20, 240 Queen Street, Brisbane, 4000

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# RUSSELLS

18 November 2018

Our Ref: AJT:JTW:20180543

**Attention: Hugh Copley**  
Legal Division  
Australian Securities Investment Commission  
Level 20  
240 Queen Street  
BRISBANE QLD 4000

By Email: [hugh.copley@asic.gov.au](mailto:hugh.copley@asic.gov.au)  
[patricia.hu@asic.gov.au](mailto:patricia.hu@asic.gov.au)  
[carl.sibilia@asic.gov.au](mailto:carl.sibilia@asic.gov.au)

Dear Colleagues

**Application for directions as to the future conduct of the winding up of LMIM and the LM Funds  
Supreme Court of Queensland Proceeding number 3508 of 2015**

We refer to your email of 16 November 2018.

We confirm that ASIC will not be appearing at the hearing on 19 November 2018 and that, unless required by the Court, ASIC does not want to take a formal role in respect of the Application.

In respect of the issues that you have requested a response to, we respond as follows:

1. The reason why Justice Dalton's orders need to be revised or limited is that the potential conflicts of interest identified by Justice Dalton no longer exist given that, inter alia, the assets of the LM Funds have been liquidated.
2. The proposal set out by Mr Whyte in Tucker & Cowen's 27 September 2018 letter was considered by our client, the response being the finalisation strategy set out in our 3 October 2018 letter and the subsequent filing of the Application.

Our client is concerned about the high level of fees charged in respect of the First Mortgage Income Fund. Our client is therefore prepared to wind that fund up for a fixed fee, attending to the winding up ancillary to the winding up of LMIM and the other LM Funds.

We will provide you with any orders made at the 19 November 2018 hearing and also tell you if the

---

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Brisbane / Sydney  
Postal – GPO Box 1402, Brisbane QLD 4001 / Street – Level 18, 300 Queen Street, Brisbane QLD 4000  
Telephone (07) 3004 8888 / Facsimile (07) 3004 8899  
[RussellsLaw.com.au](http://RussellsLaw.com.au)

Court refers to ASIC taking a formal role in respect of the Application.

Yours faithfully



**Julian Walsh**  
Special Counsel

Direct 07 3004 8836  
Mobile 0449 922 233  
JWalsh@RussellsLaw.com.au  
20180543/2555637

# Tucker&CowenSolicitors.

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Our reference: Mr Schwarz / Mr Nase

26 November 2018

Your reference: Mr Tiplady / Mr Walsh

Mr Ashley Tiplady  
Russells Lawyers  
Brisbane Qld 4000

Email: [atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)  
[jwalsh@russellslaw.com.au](mailto:jwalsh@russellslaw.com.au)

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Justin Marschke.  
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Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
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Associates.  
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Wesley Hill.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015

We refer to the Application filed by your client on 10 October 2018 for directions in relation to the dual appointments of your client and our client to wind up the FMIF, and to your letter to the ASIC dated 18 November 2018.

Your letter to ASIC states that your client is "*prepared to wind up that fund (the FMIF) for a fixed fee*".

However, the effect of the orders sought in the Application, if made by the Court, will not be that your client is limited to a fixed fee. In this regard, paragraph 2(e) of the Application makes it clear that your client is at liberty to seek "*all other additional remuneration at the Final remuneration and expenses determination*" and that the amount stated in your client's Budget "*can be reduced, increased or stay the same*".

Would you please clarify whether your client is seeking orders in the form set out in paragraph 2(e) of the Application? If not, what orders are sought and does your client propose to file and serve an Amended Application?

Yours faithfully



Alex Nase

Tucker & Cowen

Direct Email: [anase@tuckercowen.com.au](mailto:anase@tuckercowen.com.au)

Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.

cc: Mr Hugh Copley, Australian Securities and Investments Commission, by email: [hugh.copley@asic.gov.au](mailto:hugh.copley@asic.gov.au)

# RUSSELLS

30 November 2018

Our Ref: AJT:JTW:20180543

Your Ref: Mr Schwarz

Tucker & Cowen  
Level 15  
15 Adelaide Street  
BRISBANE QLD 4000

By Email: [emalloy@tuckercowen.com.au](mailto:emalloy@tuckercowen.com.au)  
[dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)

Dear Colleagues

**Bruce & Anor v LM Investment Management Limited ("LMIM") & Ors**  
**Queensland Supreme Court Proceeding No. BS3383/2013**  
**Remuneration of the Court appointed Receiver David Whyte**

Dear Colleagues

**Application for directions as to the future conduct of the winding up of LMIM and the LM Funds**  
**Supreme Court of Queensland Proceeding number 3508 of 2015**

We refer to your recent correspondence in respect of our client's application filed on 10 October 2018 that is set down for hearing on 10 December 2018 ("**the Application**").

We have recently responded to your 16 November 2018 and 26 November 2018 letters. Your other correspondence has raised the retirement of the Deutsche Bank receiver ("**DB Receivers**"), the contradictor orders sought relevant to the Feeder Fund Proceeding and the Clear Accounts Proceeding and in respect of our client's estimates for winding up the FMIF. Although those issues have been addressed in Mr Park and Ms Trenfield's affidavit evidence and in part in earlier correspondence, for completeness we provide the following responses.

## **Deutsche Bank Receivers**

We have written to the DB Receivers on 16 November 2018 and on 30 November 2018, giving them notice of the application. We have also put them on notice that we will bring to the court's attention their failure to retire as receivers and managers of LMIM and their failure to conclude negotiations with KordaMentha Pty Ltd in respect of obtaining a release relevant to MPF.

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The DB Receivers are however not named as a party to this proceeding. The issues and proposed strategy for finalisation of the winding up of LMIM and the LM Funds set out in our 3 October 2018 letter also primarily relate to your and our client's dual appointments and the basis on which those appointments need to continue so that the winding up of LMIM and the LM Funds can be completed. Although the DB Receivers' failure to retire is a concern, the issues which our client's application seeks to address can still be resolved without the DB Receivers appearing at the 10 December 2018 hearing.

### **Contradictor Orders**

Our client has been unable to act as a contradictor in the Clear Accounts Proceeding and the Feeder Fund Proceeding to date as LMIM is in its own right without funds. He has therefore applied to the Court for orders that he be funded to act as a contradictor in respect of those proceedings.

We understand that an in-principle settlement has been reached in respect of the Feeder Fund Proceeding, this having occurred after the application was filed. Given that likely settlement, and subject to the reasonableness of that settlement and the performance of any deed of settlement it may not be necessary for our client to be funded as a contradictor in respect of that proceeding.

The Clear Accounts Proceeding has not however been resolved, your client having been given leave *nunc pro tunc* to commence the proceedings and being able to easily apply to the Court so that the proceeding is no longer stayed. If your client continues with that proceeding it will be necessary for our client to defend the proceeding, the outcome of that proceeding crucial to our client's right of indemnity from the scheme property of the FMIF. Our client has not previously been able to act as a contradictor in respect of that proceeding although it will be able to do so if the orders sought are made.

### **Cost of winding up the FMIF**

The affidavit of Ms Trenfield's sworn on 28 November 2018 sets out both "one-off" and recurring monthly remuneration and expenses in respect of the winding up of the FMIF. If orders are made by the court that FMIF be wound up by our client, then there will be a monthly fixed fee, being 50% of the budgeted amount.

At the proposed application for the final determination of remuneration and expenses orders will be sought in respect of the other 50% of the budgeted amount. If the budgeted amounts are exceeded that will be an issue for the court to consider at that remuneration and expenses application.

Yours faithfully



**Julian Walsh**  
Special Counsel

Direct 07 3004 8836  
Mobile 0449 922 233  
JWalsh@RussellsLaw.com.au

20180543/2563635

# Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Nase

23 November 2018

Your reference:

The Associate to the Honourable Justice Ann Lyons  
Senior Judge Administrator  
Supreme Court of Queensland

Email: [associate.alyonsj@courts.qld.gov.au](mailto:associate.alyonsj@courts.qld.gov.au)

Principals:  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Davey.

Consultant:  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.  
Marcelle Webster.

Dear Associate

Associates.  
Emily Anderson.  
James Morgan.  
Scott Hornsey.  
Paul Armit.  
Wesley Hill.

## Proceedings Concerning the LM First Mortgage Income Fund

1. We act for Mr David Whyte ("Mr Whyte"). Mr Whyte was appointed by an order of Justice Dalton to take responsibility for the winding up of the LM First Mortgage Income Fund ("FMIF") and to be the Court-Appointed Receiver of the FMIF ("the Appointment").
2. The winding up of the FMIF is a complex matter which has given rise to a number of Supreme Court proceedings.
3. Four of these proceedings have been placed on the Commercial List, with Justice Jackson as the supervising Judge.
4. We expect, however, that the winding up of the FMIF will require a number of applications to the Court by Mr Whyte which cannot properly be heard by a potential Trial Judge (eg applications for judicial advice to Mr Whyte about whether he would be justified in settling these matters).
5. To date, applications which potentially fall into this category have been heard by a range of different Judges on the Applications List.
6. This has required each of the Judges to familiarize themselves with the rather complex history and background of this matter.
7. From both the Court's and the parties' perspective, it would seem desirable that these applications should, in future, be heard and determined by a Judge with an ongoing role in these matters.
8. The purpose of this letter is to enquire of the Senior Judge Administrator whether an arrangement of this kind would be possible.
9. We should mention that copies of this letter have been forwarded to:
  - (a) the solicitors for the liquidator of the trustee of the FMIF (Russells); and
  - (b) ASIC.
10. We should also mention that this proposed approach was also foreshadowed to Justice Jackson at a recent directions hearing in one of the FMIF matters.

11. For the Senior Judge Administrator's assistance, further detail of this matter is set out below.

FMIF and its Winding Up

12. The FMIF is a managed investment scheme. The scheme was registered under Chapter 5C of the *Corporations Act 2001* (Cth) on about 28 September 1999. The responsible entity and trustee of the FMIF was LM Investment Management Ltd ("LMIM").
13. The FMIF raised funds from the public through the issue of prospectuses and/or public disclosure statements. The FMIF then invested those funds in loans to property developers, which were secured by registered mortgages over real property. As at today's date, the FMIF has 4559 separate members in its unit register. The total funds invested by those members in the FMIF totalled about \$478 million.
14. On 19 March 2013, LMIM was placed into voluntary administration. It was then placed into liquidation on 1 August 2013. Mr John Park ("the Liquidator") was an Administrator and is now the Liquidator of LMIM. Russells are the solicitors for the Liquidator.
15. On 21 August 2013, orders were made by Justice Dalton for the winding up of the FMIF as a managed investment scheme in Supreme Court proceedings 3383/13. By those orders our client, Mr Whyte, was appointed as the person responsible to ensure the winding up of the FMIF in accordance with its Constitution, and as the receiver of its property. A copy of those orders is attached. These orders were upheld by the Court of Appeal in [2014] QCA 136 (Fraser JA, Gotterson JA and Daubney J agreeing).
16. In the time since his appointment in August 2013, Mr Whyte has undertaken substantial work to realise the value in the property of the FMIF, as a result of which there is currently cash at bank in excess of \$60 million.
17. However, the winding up has also involved Mr Whyte commencing a number of proceedings in the Supreme Court to resolve substantive issues concerning the FMIF (namely BS 12317/14, 2166/15, 11560/16 and 13534/16).
18. Three of these proceedings have been placed on the Commercial List (namely BS 12317/2014, 2166/15, 13534/16) and are being managed by Justice Jackson.
19. In conducting these proceedings, our client has been conscious of the need to maintain separation between:
- (a) matters before the Court relating to the substantive actions – which may properly be heard by a potential Trial Judge; and
  - (b) matters before the Court which may involve the internal management of the litigation by Mr Whyte – which (depending upon the issues raised) may not be appropriate for consideration by a potential Trial Judge.
20. There are two main categories of application which potentially fall into the second category:
- (a) applications by Mr Whyte for judicial advice (eg as to whether he is justified in settling a particular action).
  - (b) applications by Mr Whyte for approval of his remuneration as receiver (which may require him to provide the Court with an explanation of the approach he is taking to particular actions).

21. To date, applications within this second category have been heard on the Applications List by a range of different Judges.

Applications for Judicial Advice and Approval of Remuneration


22. To date, Mr Whyte has brought several applications for judicial advice. The most recent application was brought in proceeding BS 3508/15 and was heard by Justice Burns.
23. However, a number of further applications for judicial advice are expected to be filed over the next six months, as proceedings go to mediation.
24. Indeed, in one of these matters, a successful mediation has just been completed (BS 13534/16). It is envisaged that an application for judicial advice in relation to this matter will be brought in February or March 2019.
25. Over the course of his receivership, Mr Whyte has also brought a total of ten applications for approval of remuneration in relation to his appointment to the FMIF, as to which:-
- (a) nine of which have been heard and determined, as follows:
    - (i) by McMurdo J on 28 August 2014;
    - (ii) by Mullins J on 27 November 2014;
    - (iii) by Jackson J on 23 June 2015;
    - (iv) by Martin J on 11 December 2015;
    - (v) by Douglas J on 26 June 2016;
    - (vi) by Daubney J on 2 December 2016;
    - (vii) by Mullins J on 30 June 2017;
    - (viii) by Applegarth J on 30 November 2017;
    - (ix) by Boddice J on 21 June 2018;
  - (b) all have been brought in proceeding BS 3383/13, the proceeding in which Mr Whyte was appointed; and
  - (c) the tenth was filed on 14 November 2018, for approval of remuneration for the six month period from 1 May 2018 to 31 October 2018. That application is listed for hearing in the applications list on 29 November 2018 and members of the FMIF have been served in accordance with substituted service Orders made by the Honourable Justice Peter Lyons dated 1 June 2015 in proceeding 3383/13. A copy of those orders is attached.
26. Both of the Applications List Judges listed for the week of 29 November 2018 (Mullins J and Applegarth J) have heard at least one of these applications in the past.

27. Subject to any change which may occur in the future arrangements for dealing with remuneration, Mr Whyte envisages that he will continue making periodic applications for remuneration until the conclusion of his Appointment in relation to the FMIF.
28. It is possible that these arrangements will change, as a result of an application filed by the Liquidator in BS 3508/18. That application is listed to be heard by Justice Jackson on 10 December 2018.
29. At a review of that application on 19 November 2018, the question of whether the current remuneration application should also be heard by Justice Jackson was raised with his Honour – as was Mr Whyte's proposal that a nominated Judge deal with matters of this kind.
30. His Honour indicated that he was not in a position to hear the remuneration application, but otherwise did not express a view about the present proposal.

Request for allocation of matters to a Judge

31. As appears from the circumstances outlined above, the winding up and receivership of the FMIF, including the remaining litigation, is attended by considerable factual and legal complexity.
32. Over at least the next six months, it seems likely that a number of applications will be brought by Mr Whyte to seek judicial guidance about the proper conduct of the receivership and to obtain approval of his remuneration. It is envisaged that all such applications would be brought in the one proceeding - BS 3383/13.
33. In these circumstances, it would seem desirable for all these applications to be heard and determined by the same Judge (other than a potential Trial Judge), to avoid the need for a number of different Judges to familiarize themselves with this matter.
34. We are conscious of the practical difficulties involved in managing the Court's workload and appreciate that arrangements of this kind may not be feasible. However, we would be most grateful if such an arrangement could be considered.

Yours faithfully

  
David Schwarz  
Tucker & Cowen

Direct Email: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)  
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

cc: Russells Lawyers, by email: [atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au), [jwalsh@russellslaw.com.au](mailto:jwalsh@russellslaw.com.au)

cc: Mr Hugh Copley, Australian Securities and Investments Commission, by email: [hugh.copley@asic.gov.au](mailto:hugh.copley@asic.gov.au)

*Duplicate*

**SUPREME COURT OF QUEENSLAND**

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

**Applicants:  
PATRICIA BRUCE**

**RAYMOND EDWARD BRUCE AND VICKI**

**AND**

**First Respondent:  
CAPACITY  
MORTGAGE**

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

**AND**

**Second Respondent:  
MORTGAGE**

**THE MEMBERS OF THE LM FIRST  
INCOME FUND ARSN 089 343 288**

**AND**

**Third Respondent:**

**ROGER SHOTTON**

**AND**

**Intervener:  
COMMISSION**

**AUSTRALIAN SECURITIES & INVESTMENTS**

**ORDER**

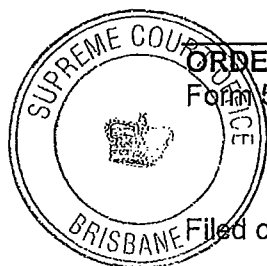
**Before: Justice Dalton**

**Date: 21 August, 2013**

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

**THE ORDER OF THE COURT IS THAT:**

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



**Form 59 R.661**

**Filed on behalf of the Third Respondent**

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

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

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

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



**IT IS DIRECTED THAT:**

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

Signed: *nil*

**Duplicate**

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

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

AND

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

AND

Third Respondent: ROGER SHOTTON

AND

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS  
COMMISSION

ORDER

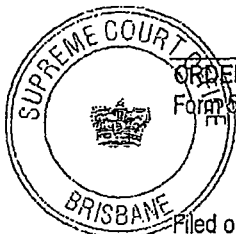
Before: Peter Lyons J

Date: 1 June 2015

Initiating document: Application filed 29 May 2015

THE ORDER OF THE COURT IS THAT:

1. Order 6 of the Honourable Justice Ann Lyons made on 5 May 2014 be vacated.



ORDER  
Form 59 R.661

Filed on behalf of the Applicant, Mr David Whyte

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

C:\Users\Waviam\AppData\Local\Microsoft\Windows\NetCache\Content.Outlook\195467FB\Amended Draft Order (Sub-service)  
(TCS00985806-002).docx

2. That service on the members of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), the companies listed in order 2(b)(i) to 2(b)(vi) below and LM Administration Pty Ltd (In Liquidation) ("LMA") of an application (including without limitation, the application filed on 29 May 2015) for approval of:-

(a) remuneration of David Whyte, as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution; and/or

(b) remuneration of David Whyte and Andrew Fielding, as the persons appointed as agents of The Trust Company (PTAL) Ltd, in lieu of LMIM, in respect of the securities held by the following companies:-

(i) Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296;

(ii) Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 787;

(iii) OVST Pty Ltd (In Liquidation) (Controllers Appointed) ACN 103 216 771;

(iv) Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916;

(v) Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed)-ACN 112 002 383; and

(vi) Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780.

together, "a Remuneration Application", and any supporting affidavit of Mr Whyte ("a Remuneration Affidavit") be effected by:-

(c) posting in a prominent place on the website "lmfmif.com" ("the Website"):-

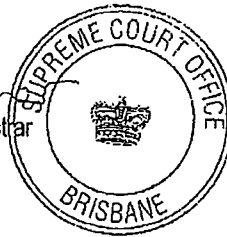
(i) a notice substantially in the form of Annexure A to this Order ("the Notice") adapted as necessary to the relevant Remuneration Application;

- (ii) the relevant Remuneration Application and Remuneration Affidavit;  
and
  - (d) sending a copy of the Notice to all members of the FMIF by each member's preferred method for distribution of notices recorded on the FMIF's register of members maintained by BDO;
  - (e) In relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the email address of a financial advisor, service is to be effected by sending to the financial advisor, the notice by email and identifying in the email the member to whom the notice is directed;
  - (f) in relation to any member of the FMIF whose preferred method of distribution is by forwarding it to the postal address of a financial advisor, service is to be effected by sending it to the member "care of" the postal address of a financial advisor
  - (g) sending a copy of the Notice to the companies listed in order 2(b)(i) to 2(b)(vi) by forwarding it to the address of the company's Receiver and Manager or Liquidator (as the case may be) recorded in the company searches exhibited to the affidavit of David Schwarz sworn 1 June 2015;
  - (h) sending a copy of the Notice to LMA at the office of Mr David Clout, the Liquidator of LMA.
3. That service of a Remuneration Application and a Remuneration Affidavit be deemed to have been effected on each of the members of the FMIF ten (10) days after all of those documents are sent pursuant to orders 2(d) to 2(h) above.
4. That service on the members of the FMIF of any further documents filed in this proceeding in support of a Remuneration Application be effected by:
- (a) causing such documents to be posted to the website [www.lmfimf.com](http://www.lmfimf.com);  
and

- (b) sending a notice to each of the members and entities referred to in paragraph 2(d) to 2(h) above directing their attention to the further documents posted on the website [www.lmfmf.com](http://www.lmfmf.com).
5. That service of any documents referred to in paragraph 4 above be deemed effected on each of the members of the FMIF ten (10) days after all of the notices are sent pursuant to order 4(b) above.
6. That Mr Whyte's costs of and incidental to this application be reserved.
7. That all further Remuneration Applications and Remuneration Affidavits be served on the members of the FMIF in accordance with these orders.

Signed:

*L Buehler*  
Deputy Registrar



ANNEXURE A

**TO THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288  
(RECEIVERS AND MANAGERS APPOINTED)(RECEIVER APPOINTED) ("FMIF")**

TAKE NOTICE that David Whyte, the person appointed:-

- a) pursuant to section 601NF(1) of the *Corporations Act 2001* (Cth) to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution; and
- b) pursuant to clause 2.1, 2.2 and 3 of Deeds of Appointment signed 24 September 2014, together with Mr Andrew Fielding, as agent of The Trust Company (PTAL) Ltd in respect of the securities it holds from Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) ACN 098 955 296, Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed) ACN 086 203 786, OVST Pty Ltd (In Liquidation) (Controllers Appointed) ACN 103 216 771, Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) ACN 109 932 916, Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed) ACN 112 002 383, and Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) ACN 116 192 780,

has applied to the Supreme Court of Queensland for orders that:-

8. the amount that Mr Whyte, as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, is entitled to claim as remuneration in respect of time spent by him and by any servants or agents of BDO who have performed work in the winding up of the FMIF for the period [date] to [date], be fixed in the amount of \$[amount] (inclusive of GST); and
9. the amount that Mr Whyte and Mr Andrew Fielding, as agents of The Trust Company (PTAL) Ltd in respect of the securities held from the companies named at paragraph b) above, are entitled to claim as remuneration in respect of time spent by them and by any servants or agents of BDO who have performed work in connection with the appointment as agents for the period [date] to [date], be approved in the amount of \$[amount] (inclusive of GST).

This application is set down to be heard by the Supreme Court of Queensland at Brisbane on [date] at [time].

Copies of the court documents in respect of the application will be available on the website [www.lmfmlf.com](http://www.lmfmlf.com).

Any member who reasonably requires a hard copy of the application and supporting material should call BDO on +61 7 3237 5999.

- 6 -

Dated: [date]

David Whyte

Court Appointed Receiver

**Melissa Nel**

---

**From:** Associate A LyonsJ <Associate.ALyonsJ@courts.qld.gov.au>  
**Sent:** Monday, 26 November 2018 4:55 PM  
**To:** David Schwarz  
**Cc:** atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au; hugh.copley@asic.gov.au; Alex Nase; Associate JacksonJ; Associate MullinsJ  
**Subject:** RE: Proceedings Concerning the LM First Mortgage Income Fund

Dear Mr Schwarz,

**RE: Proceedings Concerning the LM First Mortgage Income Fund**

Thank you for your letter of 23 November 2018. This matter has been referred to Her Honour.

As this matter is a complex matter, giving rise to a number of Supreme Court proceedings, and as the winding up of the LM First Mortgage Income Fund will require a number of applications to the Court which cannot properly be heard by a potential trial judge, Her Honour has determined that applications of this nature will be heard and determined by Justice Mullins. Justice Mullins will therefore have an ongoing role in respect of these matters.

Justice Mullins will deal with the application for remuneration on 29 November 2018 and any future applications, other than the ones managed by Justice Jackson, prior to the matter being listed for trial.

Kind regards

**Georgina Morgan**

Associate to the Honourable Justice Ann Lyons Senior Judge Administrator  
Supreme Court of Queensland  
| tel (07) 3247 4282 | e-mail [associate.al LyonsJ@courts.qld.gov.au](mailto:associate.al LyonsJ@courts.qld.gov.au)



**From:** Associate A LyonsJ  
**Sent:** Monday, 26 November 2018 8:51 AM  
**To:** 'David Schwarz' <dschwarz@tuckercowen.com.au>  
**Cc:** atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au; hugh.copley@asic.gov.au; Alex Nase <anase@tuckercowen.com.au>  
**Subject:** RE: Proceedings Concerning the LM First Mortgage Income Fund

Dear Mr Schwarz,

Thank you for your email. I have passed on your correspondence to Her Honour.

Kind regards

**Georgina Morgan**

Associate to the Honourable Justice Ann Lyons Senior Judge Administrator  
Supreme Court of Queensland  
| tel (07) 3247 4282 | e-mail [associate.al LyonsJ@courts.qld.gov.au](mailto:associate.al LyonsJ@courts.qld.gov.au)





**From:** Jessica Roberts [mailto:JRoberts@tuckercowen.com.au] **On Behalf Of** David Schwarz  
**Sent:** Friday, 23 November 2018 11:02 AM  
**To:** Associate A LyonsJ <Associate.ALyonsJ@courts.qld.gov.au>  
**Cc:** atiplady@russellslaw.com.au; jwalsh@russellslaw.com.au; hugh.copley@asic.gov.au; David Schwarz <dschwarz@tuckercowen.com.au>; Alex Nase <anase@tuckercowen.com.au>  
**Subject:** Proceedings Concerning the LM First Mortgage Income Fund

Dear Associate

Please find **attached** correspondence and enclosures for your attention.

Yours faithfully,

Sent on behalf of **David Schwarz**, Principal  
E: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au) | D: 07 3210 3506 | M: 0438 400 348

by:

**Jessica Roberts**  
Personal Assistant

E: [jroberts@tuckercowen.com.au](mailto:jroberts@tuckercowen.com.au)  
D: 07 3210 3517 | T: 07 300 300 00 | F: 07 300 300 33  
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001  
TCS Solicitors Pty Ltd. | ACN 610 321 509

**Tucker&CowenSolicitors.**

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2012 to 2018, First Tier for Insolvency (Qld) again in 2018 - Doyle's Guide**

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2019**

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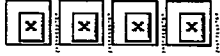
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Begin forwarded message:

From: Jonathan Henry <[jhenry@mcgrathnicol.com](mailto:jhenry@mcgrathnicol.com)>  
Date: 20 September 2018 at 5:43:11 pm AEST  
To: "[john.park@fticonsulting.com](mailto:john.park@fticonsulting.com)" <[john.park@fticonsulting.com](mailto:john.park@fticonsulting.com)>, "David Whyte (David.Whyte@bdo.com.au)" <[David.Whyte@bdo.com.au](mailto:David.Whyte@bdo.com.au)>  
Cc: Jason Preston <[JPreston@mcgrathnicol.com](mailto:JPreston@mcgrathnicol.com)>, Anthony Connelly <[AConnelly@mcgrathnicol.com](mailto:AConnelly@mcgrathnicol.com)>, Grace Chessman <[gchessman@mcgrathnicol.com](mailto:gchessman@mcgrathnicol.com)>  
Subject: LM Investments - R&M retirement

Dear John and David,

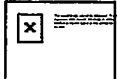


Please be advised that we expect to retire from LM Investments in the next seven days.

In recognition of the relationship between LMFMIF and the estates you both manage, please advise if any outstanding issues require our attention before we retire.

Regards,

Jonathan Henry

Partner

	Level 12, 20 Martin Place, Sydney NSW 2000 Australia T +61 2 9338 2643 M +61 437 092 393 McGrathNicol <a href="mailto:jhenry@mcgrathnicol.com">jhenry@mcgrathnicol.com</a>	
		

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**Melissa Nel**

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**From:** Sharry, Scott <ssharry@claytonutz.com>  
**Sent:** Wednesday, 3 October 2018 9:27 AM  
**To:** Alex Nase  
**Cc:** David Schwarz  
**Subject:** FW: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) ARSN 089 343 288 ("FMIF")  
  
**Importance:** High

Dear Alex,

We refer to your email of 2 October 2018.

We are instructed that the receivers wish to retire, however the administrative arrangements for the resignation are yet to be finalised. As part of those arrangements, the secured creditor has requested that a condition of the retirement is a release being granted from KordaMentha as trustees for the MPF in respect of any potential claim against the secured creditor or the receivers. We appreciate that proceedings 8032/14 and 8034/14 have now been discontinued.

We are instructed to seek that release as a matter of urgency and to the extent such release is not given within 7 days of the date of the request (which will be sent today, 3 October 2018) then our client will report to you at that time and seek to take such steps as are advised to seek to facilitate the resignation.

If KordaMentha, as trustees, provide the release then the receivers will immediately retire and will make the administrative arrangements with your client for the necessary handover to take place.

Regards

**Scott Sharry, Partner**  
**Clayton Utz**

Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7542 | F +617 3221 9669 | M +614 34 651 083 |  
ssharry@claytonutz.com | [www.claytonutz.com](http://www.claytonutz.com)

## **FROM RED TO BLACK**

Our analysis of the critical developments in the Australian restructuring market

[View our report here](#)

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**From:** Alex Nase [mailto:anase@tuckercowen.com.au]  
**Sent:** Tuesday, 2 October 2018 12:47 PM  
**To:** Sharry, Scott  
**Cc:** David Schwarz  
**Subject:** RE: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) ARSN 089 343 288 ("FMIF")  
**Importance:** High

Dear Colleagues,

We refer to the emails below.

Would you please provide us with an urgent update regarding whether Deutsche Bank AG has retired Mr Connelly and Mr Hayes, and if not, when they will be retired?

We would like to be in a position to inform the Court of the current status of the retirement of Mr Connelly and Mr Hayes at a hearing tomorrow.

regards

**Alex Nase**  
Special Counsel

E: [anase@tuckercowen.com.au](mailto:anase@tuckercowen.com.au)  
D: 07 3210 3503 | M: 0423 386 195 | T: 07 300 300 00 | F: 07 300 300 33  
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001  
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**From:** Sharry, Scott [mailto:[ssharry@claytonutz.com](mailto:ssharry@claytonutz.com)]

**Sent:** Thursday, 16 August 2018 8:36 AM

**To:** Andrea Whisson <[Reception@tuckercowen.com.au](mailto:Reception@tuckercowen.com.au)>

**Cc:** David Schwarz <[dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)>; Alex Nase <[anase@tuckercowen.com.au](mailto:anase@tuckercowen.com.au)>

**Subject:** RE: LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) ARSN 089 343 288 ("FMIF")

Dear Mr Nase

Thank you for letter.

We are instructed that Deutsche Bank AG is currently considering the ongoing appointment of Mr Connelly and Mr Hayes and we anticipate being in a position to advise further by 22 August 2018.

Regards

**Scott Sharry, Partner**  
**Clayton Utz**

Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia | D +617 3292 7542 | F +617 3221 9669 | M +614 34 651 083 | [ssharry@claytonutz.com](mailto:ssharry@claytonutz.com) | [www.claytonutz.com](http://www.claytonutz.com)



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**From:** Andrea Whisson [<mailto:Reception@tuckercowen.com.au>]

**Sent:** Monday, 13 August 2018 3:00 PM

**To:** Sharry, Scott; Josey, Nick

**Cc:** David Schwarz; Alex Nase

**Subject:** LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) ARSN 089 343 288 ("FMIF")

Dear Colleagues,

Please find **attached** correspondence.

Yours faithfully,

Sent on behalf of **Alex Nase**, Special Counsel

E: [anase@tuckercowen.com.au](mailto:anase@tuckercowen.com.au) | D: 07 3210 3503 | M: 0423 386 195

by:

**Andrea Whisson**

Receptionist/ Personal Assistant

E: [reception@tuckercowen.com.au](mailto:reception@tuckercowen.com.au)

T: 07 300 300 00 | F: 07 300 300 33

Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001

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TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345, Brisbane. Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / [www.tuckercowen.com.au](http://www.tuckercowen.com.au)

Our reference: Mr Schwarz / Mr Nase

16 October 2018

Your reference: Mr Tiplady / Mr Walsh

Mr Ashley Tiplady  
Russells Lawyers  
Brisbane Qld 4000

Email: [atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)  
[jwalsh@russellslaw.com.au](mailto:jwalsh@russellslaw.com.au)

Principals.  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Davey.

Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.  
Marcelle Webster.

Associates.  
Emily Anderson.  
James Morgan.  
Scott Hornsey.  
Robert Tooth.  
Paul Armit.  
Wesley Hill.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015

We refer to the application filed by your clients on 10 October 2018 seeking directions in relation to the dual appointments in the winding up of the FMIF.

We note that your client has not sought any orders in relation to the retirement or removal of the Receivers and Managers appointed by Deutsche Bank AG, Mr Hayes and Mr Connelly.

We note that was one of the issues raised by His Honour, and one of the issues that our client understands prompted the application.

We confirm that our client has no objection to your clients seeking orders in relation to the retirement or removal of Mr Hayes and Mr Connelly.

Our client understands that Mr Hayes and Mr Connelly have not yet retired. It is not presently clear to us whether our client has standing to apply to Court to remove Mr Hayes and Mr Connelly.

In relation to the orders sought in the application, we note that despite Mr Peden QC's comments at recent court hearings about presenting all the options to His Honour, your client has not done so and instead, only seeks directions in relation to one option, that is, that your client take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution.

We will write to you regarding the orders sought in the application, and our client's views in relation to same, separately, and in due course.

Yours faithfully



David Schwarz

Tucker & Cowen

Direct Email: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)

Direct Line: (07) 3210 3506

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# MinterEllison

17 October 2018

BY EMAIL ssharry@claytonutz.com

Mr Scott Sharry  
Partner  
Clayton Utz  
Level 28, Riparian Plaza  
71 Eagle Street  
BRISBANE QLD 4000

Dear Mr Sharry

**LM Investment Management Limited (in Liquidation)(Receivers & Managers Appointed)("LMIM") – KordaMentha Pty Ltd as Trustees of the LM Managed Performance Fund – Supreme Court of Queensland Proceeding No. 8032/14 and Supreme Court of Queensland Proceeding No. 8034/14 (Proceedings)**

We refer to your letter dated 3 October 2018.

We confirm that proceedings BS8032/14 (Barly Wood) and BS8034/14 (Lifestyle) have been discontinued. Proceeding BS12716/15 (AIIS/Alto) has also been discontinued.

On 2 October 2018, our client lodged the following proofs of debt in the liquidation of LMIM:

1.	AIIS and Alto	\$3,905,721.81
2.	Barly Wood	\$5,128,071.34
3.	Lifestyle	\$18,982,171.51
4.	Bellpac	\$4,153,731.32
5.	Greystanes	\$10,706,853.84
6.	Kingopen	\$19,948,253.18
7.	LM Capalaba	\$1,281,024
8.	Lot 111	\$2,320,118.62
9.	Madison Estate	\$254,676,177.58
10.	Peter Drake	\$17,307,395.78
11.	Pre-paid Management Fees	\$16,518,568.19

These proofs do not assert any claim against LMIM as trustee of the First Mortgage Income Fund.

Our client is not obliged to provide your clients with a "release", and it will not be providing one.

Yours faithfully

MinterEllison  
*[Signature]*

Contact: David O'Brien T: +61 7 3119 6159  
F: +61 7 3119 1159 david.obrien@minterellison.com  
Partner: David O'Brien T: +61 7 3119 6159  
OUR REF: DOB 407735740

enclosure

cc Mr David Schwarz, Tucker & Cowen

Level 22 Waterfront Place 1 Eagle Street Brisbane  
PO Box 7844 Waterfront Place QLD 4001 Australia DX 102 Brisbane  
T +61 7 3119 6000 F +61 7 3119 1000 minterellison.com

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**Australian Securities and Investments Commission  
Corporations Act 2001 section 915B**

**Notice of Suspension of Australian Financial Services Licence**

To: LM Investment Management Limited ACN 077 208 461  
C/- FTI Consulting  
Level 20  
345 Queen Street  
BRISBANE QLD 4000

TAKE NOTICE that under s915B(3)(b) of the Corporations Act 2001 (Act), the Australian Securities and Investments Commission (ASIC) hereby suspends Australian financial services licence number 220281 held by LM Investment Management Limited ACN 077 208 461 (**Licensee**) until 31 March 2020.

Under s915H of the Act, ASIC specifies that the licence continues in effect as though the suspension had not happened for the purposes of the provisions of the Act specified in Schedule B regarding the matters specified in Schedule A.

**Schedule A**

The provision by the Licensee of financial services which are reasonably necessary for, or incidental, to the transfer to a new responsible entity, investigating or preserving the assets and affairs of, or winding up of,:

1. LM Cash Performance Fund ARSN 087 304 032;
2. LM First Mortgage Income Fund ARSN 089 343 288;
3. LM Currency Protected Australian Income Fund ARSN 110 247 875;
4. LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868;
5. LM Australian Income Fund ARSN 133 497 917;
6. LM Australian Structured Products Fund ARSN 149 875 669.

**Schedule B**

- (a) The provisions of Chapter 5C;
- (b) The provisions of Chapter 7, other than the provisions in Parts 7.2, 7.3, 7.4 and 7.5.

Dated this 26 September 2018

Signed   
Graeme Darcy Plath, a delegate of the Australian Securities and Investments Commission

**Australian Securities and Investments Commission  
Corporations Act 2001 — Subsections 111AT(1) and 601QA(1) — Exemption**

**Enabling legislation**

1. The Australian Securities and Investments Commission makes this instrument under subsections 111AT(1) and 601QA(1) of the Corporations Act 2001 (*Act*).

**Title**

2. This instrument is ASIC Instrument 18-0166.

**Commencement**

3. This instrument commences on the day it is signed.

**Exemption**

4. LM Investment Management Limited (in liquidation) (receivers appointed) ACN 077 208 461 in its capacity as the responsible entity (*Responsible Entity*) of LM First Mortgage Income Fund ARSN 089 343 288 (*Scheme*) does not have to comply with:
  - (a) the disclosing entity provisions in Part 2M.3 of the Act in relation to a financial year or half-year of the Scheme; and
  - (b) section 601HG of the Act in relation to a financial year of the Scheme.

**Conditions**

5. The Responsible Entity must comply with any obligation to which the exemption applies by no later than the last day of the deferral period.

**Where exemption applies**

6. The exemption applies where the Responsible Person does, or causes to be done (or, where the Responsible Person fails to do so, the Responsible Entity although not being required to do, within 28 days of becoming aware that the Responsible Person has failed to do so, does, or causes to be done), the following:
  - (a) publishes in a prominent place on the website maintained by the Responsible Person for the Scheme (or, in the case of the Responsible Entity, the Responsible Entity publishes on a website maintained by it for the purpose of providing information to members of the Scheme), a copy of this instrument accompanied by a notice explaining the relief granted by this instrument;
  - (b) prepares and makes available to members of the Scheme within 3 months after the end of each relevant period, a report for the relevant period which includes the following information unless disclosure of that information would be prejudicial to the winding up:

- (i) information about the progress and status of the winding up of the Scheme, including details (as applicable) of:
  - A. the actions taken during the period;
  - B. the actions required to complete the winding up;
  - C. the actions proposed to be taken in the next 12 months;
  - D. the expected time to complete the winding up; and
- (ii) the financial position of the Scheme as at the last day of the relevant period (based on available information);
- (iii) financial information about receipts for the scheme during the period; and
- (iv) the following information at the end of the period:
  - A. the value of scheme property; and
  - B. any potential return to members of the Scheme; and
- (c) maintains adequate arrangements to answer, within a reasonable period of time and without charge to the member, any reasonable questions asked by members of the Scheme about the winding up of the Scheme.

7. The exemption ceases to apply on 16 March 2020.

#### **Interpretation**

8. In this instrument:

***deferral period*** means the period starting on the date this instrument is signed and ending on 16 March 2020.

***disclosing entity provisions*** has the meaning given by section 111AR of the Act.

***relevant period***, in relation to a report, means each period of 6 months starting on 1 January 2018.

***Responsible Person*** means the person appointed under subsection 601NF(1) of the Act to take responsibility for ensuring that the Scheme is wound up in accordance with its constitution.

Dated this 15<sup>th</sup> day of March 2018.

A. Duffy

Signed by Andrew Duffy

as a delegate of the Australian Securities and Investments Commission

27 September 2018

**TO INVESTORS**

Dear Member

**LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 (RECEIVERS AND MANAGERS APPOINTED)  
(RECEIVER APPOINTED) ("THE FUND")**

I attach the unaudited accounts for the Fund for the year ending 30 June 2018.

The accounts have been prepared by collating the records maintained by the Fund and receipts and payments and other records of FTI and McGrathNicol.

The accounts have been prepared in accordance with the Scheme Constitution, the recognition and measurement requirements of the Australian Accounting Standards and other authoritative pronouncements of the Australian Accounting Standards Board. The accounts have been reviewed by the BDO audit team. However, their work does not constitute a full audit and therefore, the accounts are provided on an unaudited basis.

Should members require further information, please contact BDO on the details provided below.

**BDO**

GPO Box 457

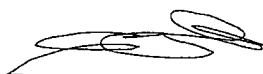
Brisbane QLD 4001

Phone: +61 7 3237 5999

Fax: +61 7 3221 9227

Email: [enquiries@lmfmif.com](mailto:enquiries@lmfmif.com)

Yours sincerely



David Whyte  
Court Appointed Receiver

**Disclaimer:**

*The 30 June 2018 financial statements were compiled by BDO Business Restructuring Pty Ltd however we did not audit those financial statements and, accordingly, express no opinion or other form of assurance on them.*

**LM FIRST MORTGAGE INCOME FUND**  
**(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**  
**ABN: 66 482 247 488**

Report for the year ended 30 June 2018

Disclaimer

The 30 June 2018 financial statements were compiled by BDO Business Restructuring Pty Ltd but we did not audit those financial statements and, accordingly, express no opinion or other form of assurance on them.

**LM FIRST MORTGAGE INCOME FUND**  
**(RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**  
**ABN: 66 482 247 488**

**Financial Statements for the year ended 30 June 2018**

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Statement of comprehensive income	3
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Statement of changes in net assets attributable to unitholders	5
Statement of cash flows	6
Notes to the financial statements for the year ended 30 June 2018	7

The Responsible Entity of LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) is LM Investment Management Limited (ABN 68 077 208 461) (in Liquidation) (Receivers and Managers Appointed).



**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**STATEMENT OF COMPREHENSIVE INCOME**

**For the year ended 30 June 2018**

	Note	30 June 2018 \$	30 June 2017 \$
<b>Income</b>			
Interest revenue - cash assets	12	1,508,456	1,506,468
Other Income	3 (a)	1,687,695	-
		<b>3,196,151</b>	<b>1,506,468</b>
<b>Expenses</b>			
Custodian fees & legal fees	9	(113,573)	86,709
Net Impairment losses on mortgage loans	6 (a)	614,117	120,542
Adjustment on foreign exchange accounts		(4,129)	3,548
Other expenses	4	4,625,299	4,384,080
<b>Total expenses excluding distributions to unitholders</b>		<b>5,121,714</b>	<b>4,594,879</b>
<b>Net profit (loss) before distributions to unitholders</b>		<b>(1,925,563)</b>	<b>(3,088,411)</b>
Distributions paid/payable to unitholders			-
<b>Net profit (loss) after distributions to unitholders</b>		<b>(1,925,563)</b>	<b>(3,088,411)</b>
Other comprehensive income			-
<b>Net profit (loss) after distributions to unitholders</b>		<b>(1,925,563)</b>	<b>(3,088,411)</b>
Income tax expense			-
<b>Changes in net assets attributable to unitholders after income tax expense</b>		<b>(1,925,563)</b>	<b>(3,088,411)</b>

The Statement of Comprehensive Income is to be read in conjunction with the notes to the financial statements.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**STATEMENT OF FINANCIAL POSITION**

**As at 30 June 2018**

	Note	30 June 2018	30 June 2017
<b>ASSETS</b>		<b>\$</b>	<b>\$</b>
Cash and cash equivalents	11	70,194,328	73,094,783
Receivables	10	469,030	351,024
Loans & Receivables	6	44,235	3,620,167
<b>TOTAL ASSETS</b>		<b>70,707,593</b>	<b>77,065,974</b>
<b>LIABILITIES</b>			
Payables	7	2,451,143	6,883,961
Distributions payable	3 (b)	1,372,036	1,372,036
<b>Total liabilities excluding net assets attributable to unitholders</b>		<b>3,823,179</b>	<b>8,255,997</b>
<b>NET ASSETS</b>		<b>66,884,414</b>	<b>68,809,977</b>
Represented by:			
<b>Net assets attributable to unitholders</b>	5	<b>66,884,414</b>	<b>68,809,977</b>
(calculated in accordance with IFRS)			

The Statement of Financial Position is to be read in conjunction with the notes to the financial statements.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**STATEMENT OF CHANGES IN NET ASSETS ATTRIBUTABLE TO UNITHOLDERS**

**For the year ended 30 June 2018**

		<b>30 June 2018</b>	<b>30 June 2017</b>
	<b>Note</b>	<b>\$</b>	<b>\$</b>
<b>TOTAL</b>			
Opening balance		68,809,977	71,898,388
Units issued during the year	5	-	-
Units redeemed during the year	5	-	-
Units issued on reinvestment of distributions		-	-
Changes in net assets attributable to unitholders		(1,925,563)	(3,088,411)
<b>Closing Balance</b>		<b>66,884,414</b>	<b>68,809,977</b>

The Statement of Changes in Net Assets Attributable to Unitholders is to be read in conjunction with the notes to the financial statements.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**STATEMENT OF CASH FLOWS**

**For the year ended 30 June 2018**

	<b>Note</b>	<b>30 June 2018</b>	<b>30 June 2017</b>
		<b>\$</b>	<b>\$</b>
<b>Cash flows from operating activities</b>			
Interest and distributions received		1,508,456	1,506,468
Other operating expenses		(7,252,721)	(5,412,855)
GST and withholding tax (paid)/received		(118,005)	39,947
<b>Net cash inflow/(outflow) from operating activities</b>	<b>11 (b)</b>	<b>(5,862,270)</b>	<b>(3,866,440)</b>
<b>Cash flows from investing activities</b>			
Payments for secured mortgage loans	6 (b)	(117,090)	(248,453)
Receipts from settled mortgage loans	6 (b)	3,078,905	1,983,280
<b>Net cash inflow/(outflow) from investing activities</b>		<b>2,961,815</b>	<b>1,734,827</b>
<b>Cash flows from financing activities</b>		<b>-</b>	<b>-</b>
<b>Net increase/(decrease) in cash and cash equivalents</b>		<b>(2,900,455)</b>	<b>(2,131,613)</b>
Cash and cash equivalents at beginning of year		73,094,783	75,226,396
<b>Cash and cash equivalents at end of year</b>	<b>11 (a)</b>	<b>70,194,328</b>	<b>73,094,783</b>

The Statement of Cashflows is to be read in conjunction with the notes to the financial statements.

## LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)

### Notes to the financial statements for the year ended 30 June 2018

#### 1. CORPORATE INFORMATION

During the period March 2013 to August 2013, a series of insolvency events occurred in respect of both the Fund and the Responsible Entity for the Fund, these are detailed in the table below:

Date	Appointment
19 March 2013	John Park and Ginette Muller of FTI Consulting appointed as Administrators of LM Investment Management Ltd ("LMIM") being the Responsible Entity for the Fund.
11 July 2013	Joseph Hayes and Anthony Connelly of McGrathNicol appointed as Receivers and Managers of LMIM as the Responsible Entity of LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed) ('LMFMIF', 'Scheme' or the 'Fund') by Deutsche Bank.
1 August 2013	John Park and Ginette Muller of FTI Consulting appointed as liquidators of LMIM.
8 August 2013	David Whyte of BDO appointed by the Court as Receiver of the assets of the Fund and as the person responsible for ensuring the Fund is wound up in accordance with its Constitution.

The Scheme is an Australian registered Scheme, constituted on 13 April 1999.

#### 2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

The principal accounting policies applied in the preparation of these financial statements are set out below. These policies have been consistently applied to all periods presented, unless otherwise stated in the following text.

##### (a) Basis of accounting

This financial report has been prepared in accordance with the Scheme Constitution, the recognition and measurement requirements of the Australian Accounting Standards and other authoritative pronouncements of the Australian Accounting Standards Board. The financial report has also been prepared on a historical cost basis, except for financial assets and financial liabilities held at fair value through profit or loss, that have been measured at fair value.

The Statement of financial position is presented in decreasing order of liquidity and does not distinguish between current and non-current items. The amount expected to be recovered or settled within twelve months in relation to the balances cannot be reliably determined.

The financial report is presented in Australian Dollars (\$).

##### Statement of compliance

The financial statements have been prepared in accordance with the recognition and measurement requirements of the Australian Accounting Standards as issued by the Australian Accounting Standards Board and International Financial Reporting Standards as issued by the International Accounting Standards Board.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

### **2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)**

#### **(a) Basis of accounting (Continued)**

##### **Status of investment in fund**

During the 2009 year, the Responsible Entity closed the Scheme to new investors and suspended withdrawals subject to certain exceptions. Redemptions were suspended at this time, per the Constitution, as the Responsible Entity considered the suspension of the withdrawals to be in the best interest of the members of the Scheme.

The Scheme is now in the process of being formally wound up with redemptions and hardship provisions remaining suspended.

##### **Liquidation Basis**

Previous financial statements have been prepared on a going concern basis.

The financial statements for the periods ended 30 June 2013 onwards have not been prepared on a going concern basis due to the appointment of Administrators to the Responsible Entity for the Fund on 19 March 2013 and subsequently Liquidators on 1 August 2013 and the appointment of Receivers and Managers and Court Appointed Receiver and person responsible for ensuring it is wound up in accordance with its Constitution as detailed in Note 1. Accordingly, the financial statements for those periods have been prepared on a liquidation basis.

#### **(b) New accounting standards and interpretations**

Australian Accounting Standards and Interpretations that have recently been issued or amended but are not yet effective have not been adopted by the Scheme for the reporting period. The impact of these standards and interpretations are not expected to have a material impact on the Scheme have not been included.

#### **(c) Significant accounting judgements, estimates and assumptions**

In the process of applying accounting policies, judgements and estimations have been made which have had an impact on the amounts recognised in the accounts. The key estimates and assumptions that have a significant risk of causing material adjustment to the carrying amounts of certain assets and liabilities within the next annual reporting period are:

##### **Allowance for impairment loss on loans and receivables**

The Scheme determines whether loans are impaired on an ongoing basis. Individually assessed provisions are raised where there is objective evidence of impairment, where the Scheme does not expect to receive all of the cash flows contractually due. Individually assessed provisions are made against individual facilities.

#### **(d) Cash and cash equivalents**

Cash and cash equivalents includes cash in hand, deposits held at call with banks, other short-term highly liquid investments with original maturities of three months or less, and bank overdrafts. For the purposes of the Statement of cash flows, cash and cash equivalents as defined above, net of outstanding bank overdrafts.

#### **(e) Distribution income**

Distribution income is recognised when the Scheme's right to receive income is established.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

### **2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)**

#### **(f) Interest income**

Interest income is recognised as the interest accrues using the effective interest rate method, which is the rate that exactly discounts estimated future cash receipts through the expected life of the financial instrument to the net carrying amount of the financial asset. Interest ceases to be recognised when a loan is in default and the principal is impaired.

#### **(g) Default management fees**

Income from default management fees is recognised in line with the executed agreement with the borrower when an event of default occurs.

#### **(h) Changes in the fair value of investments**

Gains or losses on investments held for trading are calculated as the difference between the fair value at sale, or at year end, and the fair value at the previous valuation point. This includes both realised and unrealised gains and losses.

#### **(i) Fees, commissions and other expenses**

Except where included in the effective interest calculation (for financial instruments carried at amortised cost), fees and commissions are recognised on an accrual basis. Audit and compliance fees are included with 'other expenses' and are recorded on an accrual basis.

#### **(j) Financial instruments**

Financial instruments in the scope of *AASB 139 Financial Instruments* are classified as either financial assets or financial liabilities at fair value through profit or loss, loans and receivables, held-to-maturity investments, available-for-sale investments or other financial liabilities as appropriate.

When financial assets are recognised initially, they are measured at fair value, plus, in the case of investments not at fair value through profit or loss, directly attributable transactions costs. The Scheme determines the classification of its financial assets at initial recognition.

All regular way purchases and sales of financial assets are recognised on the trade date i.e. the date that the Scheme commits to purchase the asset. Regular way purchases or sales are purchases or sales of financial assets under contracts that require delivery of the assets within the period established generally by regulation or convention in the marketplace.

##### **i. Loans and receivables**

Loans and receivables are non-derivative financial assets with fixed or determinable payments that are not quoted in an active market. Loans and receivables are initially measured at fair value including transaction costs directly attributable to the financial asset. After initial recognition, loans and receivables are carried at amortised cost using the effective interest method. Gains and losses are recognised in profit or loss when receivables are derecognised or impaired, as well as through the amortisation process.

Loans and receivables are assessed for impairment at each reporting period. An allowance is made for credit losses when there is objective evidence that the Scheme will not be able to collect the loans and receivables. Impairment losses are written off when identified. Losses expected as a result of future events are not recognised. If a provision for impairment

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

### **2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)**

#### **(j) Financial instruments**

has been recognised in relation to the loan, write-offs for bad debts are made against the provision. If no provision for impairment has previously been recognised, write-offs for bad debts are recognised as an expense in the statement of comprehensive income.

A provision is made of loans in arrears where the collectability of the debts is considered doubtful by estimation of expected losses in relation to loan portfolios where specific identification is impracticable.

The components of impaired assets are as follows:

“Loans in arrears” are loans and advances for which there is reasonable doubt that the Scheme will be able to collect all amounts of principal and interest in accordance with the terms of the agreement.

“Assets acquired through the enforcement of security” are assets acquired in full or partial settlement of a loan or similar facility through the enforcement of security arrangements.

When it is determined that interest is not recoverable on certain impaired loans, the interest is suspended and not brought into income. Should the analysis of the collectability subsequently change the interest will be brought into income at the time it is determined to be collectable.

#### **(k) Payables**

Payables are carried at amortised costs and represent liabilities for goods and services provided to the Scheme prior to the end of the financial year and half year that are unpaid and arise when the Scheme becomes obliged to make future payments in respect of the purchases of these goods and services.

The distribution amount payable to investors as at the reporting date is a carried forward balance from a period prior to the appointment of the Court Appointed Receiver. This balance is recognised separately on the statement of financial position as unitholders are presently entitled, subject to confirmation, to the distributable income as at 30 June 2014 under the Scheme’s constitution. Further investigation into the distributions payable is currently being undertaken.

#### **(l) Increase/decrease in net assets attributable to unitholders**

Non-distributable income is transferred directly to net assets attributable to unitholders and may consist of unrealised changes in the net fair value of investments, accrued income not yet assessable, expenses accrued for which are not yet deductible, net capital losses and tax free or tax deferred income. Net capital gains on the realisation of any investments (including any adjustments for tax deferred income previously taken directly to net assets attributable to unitholders) and accrued income not yet assessable will be included in the determination of distributable income in the same year in which it becomes assessable for tax. Excess and undistributed income is also transferred directly to net assets attributable to unitholders.

#### **(m) Distributions**

The Trustees for the LM Managed Performance Fund previously put both the Receivers and Managers and the Court Appointed Receiver on notice of a potential claim against the Fund.

The secured creditor was not in a position to release its security due to the potential claim against the Fund. This matter has now been resolved and the Receivers and Managers have advised they are finalising their appointment. Once the secured creditor’s Receivers have retired and the funds are released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the auditor claim and Bellpac litigation. I am also required to seek the directions of the Court before proceeding with the next distribution.



## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

Notes to the financial statements for the year ended 30 June 2018

### **2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)**

#### **(n) Goods and services tax (GST)**

The GST incurred on the costs of various services provided to the Responsible Entity by third parties such as audit fees, custodial services and investment management fees have been passed onto the Scheme. The Scheme qualifies for Reduced Input Tax Credits (RITC's) at a rate of 55%.

Investment management fees, custodial fees and other expenses have been recognised in the statement of comprehensive income net of the amount of GST recoverable from the Australian Taxation Office (ATO). Accounts payable are inclusive of GST. The net amount of GST recoverable from the ATO is included in the statement of cash flows on a gross basis.

The GST component of cash flows arising from investing and financing activities recoverable or payable to the ATO is classified as an operating cash flow.

#### **(o) Applications and redemptions**

Applications received for units in the Scheme are recorded when units are issued in the Scheme. Redemptions from the Scheme are recorded when the cancellation of units redeemed occurs. Unit redemption prices are determined by reference to the net assets of the Scheme divided by the number of units on issue.

Applications received in foreign currency denominations are initially recorded in the functional currency by applying the exchange rates ruling at the date of the transaction. Foreign currency denominated unitholder funds are translated into the Schemes functional currency at balance date, using the spot rate prevailing at that date. Gains and losses arising from foreign exchange translation are recorded in the Statement of Comprehensive Income in the period in which they arise.

#### **(p) Taxation**

Under current legislation, the Scheme is not subject to income tax provided the distributable income of the Scheme is fully distributed either by way of cash or reinvestment (i.e. unitholders are presently entitled to the income of the Scheme).

#### **(q) Interest-bearing loans and borrowings**

All loans and borrowings are initially recognised at cost, being the fair value of the consideration received net of issue costs associated with the borrowing. After initial recognition, interest-bearing loans and borrowings are subsequently measured at amortised cost using the effective interest method. Amortised cost is calculated by taking into account any issue costs, and any discount or premium on settlement.

#### **(r) Foreign currency translations**

The Scheme's transactions in foreign currencies previously comprised applications and withdrawals of foreign currency unitholder funds and payment of distributions. Transactions in foreign currencies were initially recorded in the functional currency by applying the exchange rates ruling at the date of the transaction. Monetary assets and liability denominated in foreign currencies are retranslated at the rate of exchange prevailing at the balance sheet date, and exchange rate gains and losses are recognised in the statement of comprehensive income.

In relation to the total investor units, a discrepancy between the units recorded in the investor register and the units recorded in the audited and management accounts for the 2012 financial year has been identified. Investigations indicate that the discrepancy relates to the Fund's migration to a new financial database in 2010 whereby the units of investors who subscribed in a foreign currency were incorrectly recorded in the foreign currency equivalent amount, and not in the AUD equivalent amount in accordance with the PDS and Constitution. An application will be made to the Court with a view to rectifying the register.

## LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)

Notes to the financial statements for the year ended 30 June 2018

### 2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)

#### (s) Determination of fair value

Fair value is the amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm's length transaction.

The fair value for financial instruments not traded in an active market is determined using appropriate valuation techniques. Valuation techniques include: using recent arm's length market transactions; reference to the current market value of another instrument that is substantially the same; discounted cash flow analysis and option pricing models making as much use of available and supportable market data as possible.

#### (t) Estimated net asset amount per unit available to investors

The estimated amount of net assets available to investors are subject to the uncertainties indicated in this financial report.

The net assets of the fund and number of units on issue at the end of each of the periods is detailed in the table below:

	30 June 2018	30 June 2017
Estimated net amount of assets available to investors as at the period end (\$)	66,884,414	68,809,977
Total investor units (# of units) *	478,100,386	478,100,386
Estimated net asset amount per unit available to investors as at the period end (cents in the dollar)**	0.140	0.144

\* Unit #'s

In previous financial statements prepared by David Whyte, unrealised foreign exchange transactions relating to the units denominated in foreign currencies were included in the accounts as this practice was undertaken in the audited financial accounts prior to year ended 30 June 2013. The results of these transactions were notionally recorded in the financial accounts as an adjustment to the total number of investor units in accordance with accounting standards. Given the discrepancy identified as detailed in Note 2(r) above in regard to the units of investors who subscribed in a foreign currency, having obtained legal advice, Mr Whyte has decided that no further notional adjustments to the unit numbers ought to be made in the financial accounts, until the incorrect recording of units of investors who subscribed in a foreign currency has been resolved and directions from the Court have been obtained. Accordingly, the total investor unit numbers has been notionally restated above as at the balance at 30 June 2016.

#### \*\* Estimated return to investors

The estimated net asset amount per unit available to investors as set out above is subject to the resolution of a number of ongoing proceedings, including a claim against the Feeder Funds which was served on or about 7 August 2017. Given that the claim is likely to be defended, the actual net asset amount per unit available to investors is currently uncertain and an update will be provided in due course. Please refer to Note 14 below for further details regarding the claim.

The Feeder Funds are 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 (WMIF). The Feeder Funds are Class B investors and currently comprise approximately 48% of the total unitholding in the FMIF.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

### **2. BASIS OF PREPARATION AND SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (Continued)**

The claim is for declarations that the FMIF is entitled to withhold from distributions or payments otherwise payable to the Feeder Funds an amount in excess of \$55 million (for redemptions paid to the Feeder Funds when the FMIF suspended redemptions to all other investors, apart from genuine approved hardship cases), as adjusted for the amount which the Feeder Funds would otherwise have been entitled as pleaded in the statement of claim. The claim seeks a declaration cancelling approximately 35 million units issued to the Feeder Funds (which were a consequence of re-investment of distributions made to the Feeder Funds) which were issued after the FMIF suspended distributions to other investors.

If the Court grants the relief sought against the Feeder Funds and putting aside any other recoveries for the benefit of investors:

- the CPAIF and ICPAIF are not likely to receive any distribution in the winding up of the FMIF;
- the WMIF is likely to receive a smaller distribution than it otherwise would have been entitled, subject to the outcome of litigation against the FMIF and future operating costs of the FMIF;
- the FMIF can use the funds which otherwise would have been paid to the Feeder Funds for distributions to investors generally instead and, as a result, the return to other investors (Class A and Class C) will substantially increase.

### **3. INCOME AND DISTRIBUTIONS TO UNITHOLDERS**

#### **(a) Other Income**

The other income amount of \$1,687,695 relates to adjustments to the Fund's accrued expenses that were reported and expensed in prior periods during the Receivership. This amount is predominantly made up of amounts accrued for FTI's claimed remuneration and expenses up to 30 September 2015 which are no longer payable due to the recent decision of the Court and provision for reimbursement of operational expenses by FTI not previously brought to account. See Note 14 litigation for more information.

#### **(b) Distributions Payable**

The distributions payable balance of \$1,372,036 relates to distributions that appear to have been declared prior to the date of the Court Receiver's appointment which were not paid, or have not cleared or were returned unclaimed. These liabilities have not been verified and Court approval may be required before any payment is made.

Once the secured creditor's Receivers have retired and the funds are released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the auditor claim and Bellpac litigation.

I am also required to seek the directions of the Court before proceeding with the next distribution.

There have been no distributions to unitholders for the year ended 30 June 2018 or for years ending 30 June 2017, 30 June 2016 and 30 June 2015.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

**4. OTHER EXPENSES**

	<b>30 June 2018</b>	<b>30 June 2017</b>
<b>Other Expenses</b>	<b>\$</b>	<b>\$</b>
Receivers and Managers' fees and outlays (McGrathNicol)	239,310	386,228
Court Appointed Receiver's fees & outlays (BDO) *	2,239,050	1,960,705
Legal Fees	1,876,102	1,791,427
Other expenses	270,837	245,720
<b>Total</b>	<b>4,625,299</b>	<b>4,384,080</b>

\*Denotes expenses which are subject to approval by the court.

**Court Appointed Receiver's fees & outlays (BDO)**

	<b>30 June 2018</b>	<b>30 June 2017</b>
<b>The Court Appointed Receiver's fees &amp; outlays are represented by the following amounts:</b>	<b>\$</b>	<b>\$</b>
Court Appointed Receiver's investigations, litigation and other non-operating costs	1,007,573	678,368
Operating Costs of the Fund	1,231,477	1,282,337
<b>Total</b>	<b>2,239,050</b>	<b>1,960,705</b>

The Court Appointed Receiver's investigations and other non-operating costs include time costs in relation to the claim against the former auditors of the Fund, and other litigation matters which include claims against the MPF, LMIM and its directors and the claim against the Feeder Funds.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

**5. CHANGES IN NET ASSETS ATTRIBUTABLE TO UNITHOLDERS**

Movements in the net assets attributable to unitholders during the year were as follows:

Net assets attributable to unitholders	30 June 2018	30 June 2017
	\$	\$
<b>Class A</b>		
Opening balance	245,679,110	245,679,110
Units issued during the year	-	-
Units redeemed during the year	-	-
Units issued upon reinvestment of distributions	-	-
<b>Closing balance</b>	<b>245,679,110</b>	<b>245,679,110</b>
<b>Class B</b>		
Opening balance	220,196,311	220,196,311
Units issued during the year	-	-
Units redeemed during the year	-	-
Units issued upon reinvestment of distributions	-	-
<b>Closing balance</b>	<b>220,196,311</b>	<b>220,196,311</b>
<b>Class C</b>		
Opening balance	12,224,964	12,224,964
Units issued during the year	-	-
Units redeemed during the year	-	-
Units issued upon reinvestment of distributions	-	-
Foreign exchange (gain)/loss on investor funds	-	-
<b>Closing balance</b>	<b>12,224,964</b>	<b>12,224,964</b>
 Cumulative movement in changes in net assets	 (411,215,971)	 (409,290,408)
<b>Net assets attributable to unitholders</b>	<b>66,884,414</b>	<b>68,809,977</b>

**Class A**

Class A consists of unitholders who are entitled to receive the declared distribution rate. There are a number of subclasses attached to class A. These consist of the following products with varying terms:

- 1) Flexi Account investment option
- 2) Fixed Term investment option
- 3) LM Savings Plan investment option

**Class B**

Class B consists of related Scheme unitholders.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)****Notes to the financial statements for the year ended 30 June 2018****5. CHANGES IN NET ASSETS ATTRIBUTABLE TO UNITHOLDERS (cont)****Class C**

Class C consists of unitholders who have invested in foreign currencies and are entitled to receive the declared distribution rate.

Subject to the comments relating to the status of the Scheme in note 2(t) above, unitholders are entitled to one vote per unit at unitholders' meetings and as the Scheme is being wound up, unitholders rank after creditors and are equally entitled to the proceeds of the winding up procedure.

**6. LOANS AND RECEIVABLES**

	30 June 2018	30 June 2017
	\$	\$
Secured mortgage loans	6,102,290	72,696,775
Provision for impairment	(6,058,055)	(69,076,608)
	<u>44,235</u>	<u>3,620,167</u>

Loans and receivables are initially measured at the fair value including transaction costs and subsequently measured at amortised cost after initial recognition. Loans and Receivables are assessed for impairment at each reporting date. Where impairment indicators exist, the recoverable amount of the loan will be determined and compared to its carrying amount to determine whether any impairment losses exists. Impairment losses are recognised when the recoverable amount under the individual loan is less than the carrying amount of that loan.

**Material uncertainty regarding recoverability of Loans and Receivables**

For loans in default, an impairment indicator arises which requires the recoverable amount of that loan to be determined. The recoverable amount for each individual loan in default has been determined from independent valuations and/or the assets forming the security for the loans. The valuations are based on current market conditions and provide for appropriate exposure to the market and an orderly realisation of assets forming the security for the loans.

In determining the recoverable amounts, there are uncertainties involved in assessing the market values and the ability to realise those market values, particularly where the market is not active. Consequently, it is likely that there may be differences between the amounts at which the Loans and Receivables are recorded at in the financial statements for the period ended 30 June 2018, and the amounts that are actually realised. Such differences may be material. Accordingly, there is a material uncertainty regarding recoverability of Loans and Receivables.

The balance of \$44,235 represents cash available in the controllerships' bank accounts as at 30 June 2018. These funds have since been distributed to the Fund's bank account as loan repayments.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

**(a) Provisions for impairment**

The impairment loss expense relating to loans and receivables comprises:

	<b>30 June 2018</b>	<b>30 June 2017</b>
	<b>\$</b>	<b>\$</b>
Opening balance	69,076,608	68,866,088
Impairment losses provided for (recoveries) during the period	614,117	120,542
Impairment losses realised during the period	(63,632,670)	89,978
Closing balance	6,058,055	69,076,608
<b>Total provision for impairment</b>	<b>(6,058,055)</b>	<b>69,076,608</b>

**(b) Movement in default loans**

	<b>30 June 2018</b>	<b>30 June 2017</b>
	<b>\$</b>	<b>\$</b>
Gross default loans opening balance	72,696,775	74,341,624
New and increased default loans	117,090	248,453
Balances written off	(63,632,670)	89,978
Repaid	(3,078,905)	(1,983,280)
Gross default loans closing balance	6,102,290	72,696,775
Specific provision	(6,058,055)	(69,076,608)
<b>Net default loans</b>	<b>44,235</b>	<b>3,620,167</b>

**7. PAYABLES**

Payables are carried at cost and represent liabilities for goods and services provided to the Fund prior to the period end but have not yet been paid.

	<b>30 June 2018</b>	<b>30 June 2017</b>
	<b>\$</b>	<b>\$</b>
Accounts payable	2,451,143	6,883,961

Approximately \$918,458 of the accounts payable balance relates to FTI's remuneration and expenses claimed from the Fund. See Note 14 FTI litigation for more information.

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

Notes to the financial statements for the year ended 30 June 2018

**8. INTEREST BEARING LOANS AND BORROWINGS**

Interest bearing loans and borrowings relates to facilities with external providers. In July 2010, the RE entered into a new facility with an external financier, Deutsche Bank. Deutsche Bank holds a fixed and floating charge over the assets of the Fund.

As indicated in Note 1, McGrathNicol were appointed as Receivers and Managers of the Fund by Deutsche Bank as a result of a default of the finance facility by the Fund for this secured loan.

There has been a progressive sell down of the assets of the Fund which enabled \$14.1M of the loan to be repaid during the 2013 financial year and \$21.5M between July and December 2013. The facility was repaid in full in January 2014.

**9. RELATED PARTIES**

	30 June 2018	30 June 2017
	\$	\$
<u>Custodian</u>		
Custodian's fees paid by the Scheme	32,274	86,709
Custodian's legal fees (refund)	(145,847)	-
<b>Total</b>	<b>(113,573)</b>	<b>86,709</b>

Custodian

The Custodian of the Fund is The Trust Company (PTAL) Ltd. The Custodian's fees in the year ended 30 June 2016 included a claim for legal fees payable under the custodian agreement. The legal fees were incurred by the custodian defending an action brought by a mortgagor of the Scheme. This action was subsequently discontinued and PTAL was awarded costs. PTAL received a payment of \$150,000 from security for costs put up by the plaintiffs. As PTAL's costs were claimed and paid by the Fund under the custodian agreement, PTAL forwarded the security for costs monies to the Fund.

**10. RECEIVABLES**

	30 June 2018	30 June 2017
	\$	\$
Term deposit interest receivable	131,378	249,315
GST receivable	337,652	101,709
	<b>469,030</b>	<b>351,024</b>



**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

Notes to the financial statements for the year ended 30 June 2018

**11. CASH AND CASH EQUIVALENTS**

**(a) Reconciliation of cash and cash equivalents**

For the purposes of the Statement of Financial Position, the cash and cash equivalents comprise of cash at bank and in hand. The cash at bank earns interest at floating rates based on the daily bank deposit rates, however, the majority of the cash balance is invested on term deposit with a bank. The cash at bank figure includes monies held in foreign exchange accounts.

	30 June 2018	30 June 2017
	\$	\$
Cash at bank	70,194,328	73,094,783

**(b) Reconciliation of change in net assets attributable to unitholders to net cash flows from operating activities**

	30 June 2018	30 June 2017
	\$	\$
Change in net assets attributable to unitholders	(1,925,563)	(3,088,411)
<i>Adjustments for:</i>		
Non-cash impairment expense	614,117	120,542
Non-cash accrued expense reduction	(1,687,695)	-
(Gains)/loss on foreign exchange contracts	(4,129)	3,548
(increase)/decrease in other receivables	(118,005)	39,947
Increase/(decrease) in payables	(2,740,995)	(942,066)
<b>Net cash flows from/(used in) operating activities</b>	<b>(5,862,270)</b>	<b>(3,866,440)</b>

**12. INTEREST REVENUE**

Interest revenue relates to interest received on funds held in bank accounts.

Interest on loans is suspended and not brought to account when it is considered that the amounts are not ultimately recoverable from the remaining security for the loans.

**13. CONTINGENT LIABILITIES**

**Claims by KordaMentha as Trustee of the LM Performance Fund**

**Assigned Loans Claim**

In August 2014, KordaMentha Pty Ltd and Calibre Capital Pty Ltd as trustees of the MPF commenced two proceedings against LMIM alleging that the entry into Deeds of Assignment by LMIM, pursuant to which PTAL, as custodian of the FMIF assigned its right, title and interest in the securities that it held for two FMIF loans, to LMIM as trustee of the MPF, in exchange for payment of a Settlement Sum, and the alleged payment of the Settlement Sum by LMIM as trustee of the MPF, breached duties owed by LMIM to members of the MPF. Calibre Capital Pty Ltd has since resigned as trustee of the MPF, and has been removed as a party to the proceedings.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

### **Notes to the financial statements for the year ended 30 June 2018**

On the application of David Whyte, as Receiver of the property of FMIF, orders were made on 17 December 2015 adding him as second defendant in each proceeding. The plaintiff (after various amendments to its case) sought the following relief in each proceeding:

- Equitable compensation against LMIM, interest and costs
- Declarations that:
  - LMIM is entitled to be indemnified out of FMIF assets in respect of its liability to the plaintiff in the proceeding;
  - LMIM has a lien or charge over FMIF assets in respect of its liability to the plaintiff in the proceeding;
  - the plaintiff is entitled to be subrogated to the rights of LMIM in respect of the assets of FMIF.

The total amount of the claims made against assets of the FMIF is about \$24.1 million plus interest and costs.

At the review hearing on 16 December 2016, the proceedings were adjourned to a date to be fixed.

Both proceedings were discontinued by the MPF in June 2018.

#### **AIIS Loan Claim**

On 16 December 2015, KordaMentha as trustee of the MPF (MPF Trustee), commenced a proceeding against LMIM. The MPF Trustee alleged in the proceeding that:

- PTAL, as custodian of the FMIF, and LMIM as trustee of the MPF, both made loans to a borrower by the name of Australian International Investment Services Pty Ltd (AIIS);
- PTAL as custodian of the FMIF was the first registered mortgagee, and LMIM as trustee of the MPF was the second registered mortgagee;
- LMIM as trustee of the MPF approved various increases to the amount of the facility, from time to time, in breach of duty; and
- LMIM as trustee of the MPF made various advances that were used to service interest on the loan made by PTAL as custodian of the FMIF to AIIS, in breach of duty, and LMIM as RE of the FMIF received such payments with knowledge that they were made in breach of duty.

The MPF Trustee claimed the following relief in the proceeding:

- approximately \$16.82 million equitable compensation against LMIM;
- a declaration that LMIM as RE of the FMIF holds on constructive trust the amount of approximately \$3.9 million (being the amount of the payments allegedly made by LMIM as trustee of the MPF to service interest on the FMIF facility);
- a declaration that the MPF Trustee is entitled to be subrogated to the rights of LMIM, and indemnified out of assets of the FMIF in respect of, or has a lien or charge over the assets and undertakings of the FMIF to secure, the amount of approximately \$3.9 million;
- interest and costs.

The proceedings were discontinued by the MPF in June 2018.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

### **Notes to the financial statements for the year ended 30 June 2018**

#### **14. LITIGATION MATTERS**

##### **Claim against the former auditors**

A public examination (PE) of the former auditors, certain directors, former directors (Directors) and staff of LM Investment Management Limited (In Liquidation) was conducted over a period of 9 days in June 2015 and a further 9 days in October 2015.

Following the PEs, a further amended statement of claim was filed by David Whyte in the Supreme Court of Queensland and served on the former auditors of the Fund on 14 April 2016.

The former auditors' solicitors lodged and served on David Whyte an application and supporting affidavit on 27 April 2016 seeking to strike-out certain parts of the statement of claim. The hearing of the strike out application was adjourned to a date to be fixed by consent to enable appropriate directions to be made for the parties to exchange and file any further affidavit material and written submissions in advance of the hearing of the strike out application.

On 30 May 2016, David Whyte filed an application to place the proceedings on the Court's commercial list. This application was also adjourned to a date to be fixed.

On 2 August 2016, David Whyte filed a second further amended statement of claim. The parties filed submissions and further affidavit evidence as required by the orders and at the hearing of the strike out application and the commercial list application on 15 December 2016, the Court granted the application to place the proceedings on the commercial list and reserved its decision on the strike out application.

The reserved decision from the hearing of the strike out application was handed down on 8 May 2017 and the decision was not appealed. In that decision, the Court declined to strike out all of the parts of the claim that the former auditors sought to strike out. However, it did make orders striking out certain causes of action and orders were made that the statement of claim be amended to delete those causes of action.

In accordance with the Court's judgment, the statement of claim has been amended and was filed on 20 November 2017 and served on the former auditors. Details of the loss has been included in the amended statement of claim which has been calculated (at its highest) in excess of \$200 million.

The amended statement of claim filed on 20 November 2017 included a claim for compensation from the former auditors under section 1325 of the Corporations Act. Steps have been taken to amend the Claim to make specific reference to this claim for compensation under section 1325. Leave of the Court is required for such amendment, necessitating an application to the Court.

On 29 May 2018, the Court made Orders for the filing of the proposed application to amend the Claim, as well as for the auditors to make a request for further and better particulars of the further amended statement of claim.

A request for particulars was received on 19 June 2018. A further Order of the Court dated 24 July 2018 requires the response to this request to be filed and served by 19 October 2018.

Two further amendments to the statement of claim were filed on 5 July 2018 and 7 August 2018. Particulars of loss and damage were filed and served on the auditors on 23 July 2018.

The Application for leave to amend the Claim was filed on 10 August 2018. The Court has listed the hearing of the application for 27 September 2018.

Following the hearing on 27 September 2018, the next steps are to provide the particulars requested and obtain Orders programming the filing of the auditors' defence and the Receiver's reply to that defence.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

### **Notes to the financial statements for the year ended 30 June 2018**

#### **Wollongong Coal Ltd (WCL) – Convertible Bonds**

There are \$8 million in convertible bonds in Wollongong Coal Limited (WCL) which was the subject of a successful application to the Federal Court acknowledging that Bellpac Pty Ltd (In Liquidation) (Bellpac) (under the control of its liquidators) is the true owner.

The defendants appealed the decision, which was unsuccessful, however, on 12 July 2016, the defendants made application for special leave to the High Court of Australia to appeal the decision of the Federal Court. On 10 November 2016, the High Court refused to grant special leave to the defendants, and dismissed their application with costs.

In January 2016, the Bellpac Liquidator applied for the conversion of the bonds to shares. Under the terms of the Bonds, WCL is required to issue the shares within 7 days after the end of January 2016 (Due Date) which it failed to do. Instead WCL issued part of the shares in early February 2016 and the balance of the shares after resolution of its members, in May 2016.

As WCL did not issue the shares as required under the terms of the Bonds, the Bellpac Liquidator brought proceedings against WCL seeking orders requiring WCL to perform its obligation to redeem the Bonds by

- Redeeming all of the Bonds which were not converted by the Due Date; and
- Pay to the Liquidator \$8M or such other amount being the nominal principal value of the unconverted Bonds (those issued in May 2016), plus interest.

The proceedings have been adjourned pending completion of the terms of a heads of agreement with WCL pursuant to which Bellpac will receive cash of \$6.3 million in exchange for the transfer of the shares to WCL or alternatively cancellation of the shares.

The remaining condition precedent (Sunset Date) to the settlement with WCL has been extended several times from the original condition precedent fulfilment date and the Liquidator was successful in negotiating as part of the agreement to extend the Sunset Date that WCL pay interest at 3% p.a. from 2 October 2017 until settlement. The last agreed extension granted was to 18 October 2018.

#### **Proceedings against the MPF, LMIM and the Directors of LMIM**

On 17 December 2014, David Whyte filed a claim and statement of claim in the Supreme Court of Queensland, against a number of parties, including the MPF Trustee, alleging the FMIF suffered loss as a result of a decision to pay an amount to the MPF in 2011 on settlement of litigation between Bellpac and Gujarat NRE Minerals Ltd (now called Wollongong Coal Limited). The claim is for \$15.5M plus interest.

The proceedings have progressed to completion of discovery stage for the plaintiff and certain defendants. The defendants who are participating in the proceedings have all filed defences (and in some instances, amended defences) to which the plaintiff has filed replies.

A draft trial bundle of documents was served on the defendants on 1 June 2018. The proceedings were listed for review on 16 August 2018 following which a timetable was implemented to progress the proceedings to a trial in March/April 2019. Specifically, and amongst other things, it was ordered that the plaintiff serve an amended draft trial bundle by 14 September 2018. This has been completed and the defendants' response is due by 5 October 2018. Following the finalisation of the contents of the trial bundle, affidavit evidence is to be exchanged by the parties along a timeline from November 2018 to February 2019 in advance of trial.

## LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)

### Notes to the financial statements for the year ended 30 June 2018

#### FTI litigation

The RE for the Fund is LM Investment Management Ltd (in Liquidation) ("LMIM"). On 8 April 2015, the Liquidators of LMIM ("FTI") filed an application (which was subsequently amended on 20 July 2015) in the Supreme Court of Queensland, for directions in relation to their ongoing role, and the extent of their powers and responsibilities to undertake certain duties, for, and on behalf of, the FMIF. The application was heard before the Court on 20 July 2015, and orders were made on 17 December 2015.

#### Remuneration claim

On 16 December 2015, FTI filed a Further Amended Originating Application ("FAOA") seeking a determination of their remuneration as administrators, and liquidators, of LMIM. The FAOA sought payment in the amount of \$3,098,251.83 plus GST (for the period from the date of their appointment as administrators on 19 March 2013 to 30 September 2015) from the assets of the Fund. The matter was heard by the Court on 22 February and 14 March 2016 and the decision was reserved.

The Court handed down its reasons for judgment on 17 October 2017 in relation to FTI's application for approval of their remuneration and payment from assets of the Fund. Orders reflecting His Honour's reasons for judgment were made on 22 November 2017 to the effect that FTI be paid a total of \$1,827,205.23 "(plus GST)" for remuneration and out of pocket expenses from property of the Fund. The approved amount of \$1,827,205.23 was paid to FTI in December 2017.

As to the costs of the proceedings, the court orders provide that certain specified proportions of FTI's costs on an indemnity basis are to be paid from the property of the Fund and 3 other LM funds.

On 12 June 2018, FTI advised David Whyte of further claims against the Fund for remuneration and disbursements outstanding from 1 October 2015 up to 30 April 2018 totalling \$363,929.47 exclusive of GST.

On 17 July 2018, Mr Park of FTI, who is now the sole Liquidator of LMIM, filed an application in the Court seeking payment of remuneration of approximately \$743,889.89 inclusive of GST from property of the FMIF, relating to various periods between 19 March 2013 and 30 June 2018. The application was heard on 6 September 2018 and adjourned to 3 October 2018.

Mr Park's claimed fees and expenses have been included in the Fund's Payables (as referred to in Note 7 above), though this amount is not admitted and is subject to the outcome of FTI's application to the Court.

#### Indemnity claims

In accordance with the Orders made by the Court on 17 December 2015, FTI submitted two indemnity claims to David Whyte, seeking payment of the sums of \$241,453.54 and \$375,499.78 respectively, from the assets of the Fund.

The first claim (of \$241,453.54) was made with respect to the legal costs incurred by LMIM in relation to the appeal of the decision of Dalton J appointing David Whyte as receiver of the assets of the Fund, and the person responsible for ensuring the Fund is wound up in accordance with its Constitution. This claim was rejected by David Whyte.

As to the second claim, David Whyte accepted, and paid, \$84,954.41, rejected \$169,243.26 and deferred consideration of \$5,473.59 (pending the outcome of the judgment to be handed down in respect of the FAOA for FTI's remuneration). The balance of the second claim was withdrawn by FTI.

On 20 May 2016, FTI filed an application in the Supreme Court of Queensland, seeking declarations that the claims for indemnity rejected by David Whyte are properly payable to LMIM from the Fund ("Indemnity Application"), and payment thereof. On 16 February 2017, Jackson J made directions as to the steps to progress the Indemnity Application. The Indemnity Application was heard by the Court on 8 and 9 May 2017 and the Court reserved its decision. Shortly before the hearing, the Indemnity Application was amended, to incorporate a claim by FTI for direct indemnity in favour of FTI (rather than in favour of LMIM) from the property of the FMIF.

## **LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

### **Notes to the financial statements for the year ended 30 June 2018**

David Whyte obtained judicial advice (by Order of Burns J) to the effect that he is justified in raising the clear accounts rule in opposition to the Indemnity Application, in relation to certain identified claims.

The Court handed down its reasons for judgment on 17 October 2017, and Orders were made on 22 November 2017 to give effect to the Judgment. Jackson J relevantly found that the legal costs of the appeal in 8895 of 2013 of \$263,127.13 and costs of assessment of those costs in the sum of \$9,068.68 are not payable out of the property of the FMIF, that the Liquidators are entitled to direct indemnity out of the FMIF for various amounts totalling \$44,158, and that the clear accounts rule operates to suspend LMIM's claimed right to payment from the assets of the FMIF until the resolution of the claim made in the proceeding 11560/16 (the LMIM Claim). The Court also ordered to the effect that 90% of FTI's costs of the Indemnity Application be paid out of the assets of the FMIF on the indemnity basis, to be assessed if not agreed.

It is anticipated that there are likely to be further claims by Mr Park for indemnity for expenses from property of the FMIF.

#### **LMIM Claim**

A statement of claim filed in November 2016 to preserve claims in relation to certain transactions and avoid possible expiry of statutory limitation periods has been amended and has now been served on LMIM. The claims are for various alleged breaches of trust in relation to certain transactions including pre-paid management fees and loan management fees paid to LMIM or its service entity LM Administration Pty Ltd. On 25 July 2018, the Court granted leave to proceed with this claim and ordered that the claim be stayed until further order.

#### **Claim against Feeder Funds (Class B unitholders)**

The statement of claim which was filed against the Feeder Funds in December 2016 to preserve certain claims has now been amended and has now been formally served on the parties representing the Feeder Funds. The Feeder Funds are 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 (WMIF). The claim concerns approximately \$55 million of redemptions paid to the Feeder Funds when the FMIF had suspended redemptions to other investors (apart from genuine approved hardship cases) and approximately \$19.5M of income distributions made to the Feeder Funds when income distributions to other investors were suspended (and the reinvestment of these distributions). The relief sought in the claim includes declarations to withhold from distributions or payments otherwise payable from the FMIF to:

- CPAIF in the sum of \$40,583,109 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the CPAIF would otherwise have been entitled as referred to in the statement of claim;
- ICPAIF in the sum of \$5,044,118.30 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the CPAIF would otherwise have been entitled as referred to in the statement of claim;
- WMIF in the sum of \$9,432,090.76 plus interest, as adjusted for the difference between the sum paid for capital distributions in early to mid-2013 and the amount the WMIF would otherwise have been entitled as referred to in the statement of claim.

If the claim is successful, it will impact on the return to the Feeder Funds from the winding up of the FMIF and, in the case of the CPAIF and ICPAIF, it is expected that the claim will exhaust any estimated return (based on the estimated unit value as calculated herein) to those funds (such that they will not be entitled to any distribution from the FMIF). In the case of the WMIF, the claim will substantially reduce its entitlement to any distribution.

Mr Whyte made an application under Section 59 of the Trusts Act to seek directions in relation to how the differing interests of LMIM are to be represented in the proceedings and an application under Section 500 of the Corporations Act to seek leave to proceed against LMIM (the Applications). The hearing of the Applications, which was originally listed on 8 December 2017,

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)**

**Notes to the financial statements for the year ended 30 June 2018**

was adjourned to a date to be fixed on 7 December 2017. The Applications together with an application to have the matter listed on the Commercial List (Commercial List Application) were set down for hearing on 29 May 2018.

On 29 May 2018 the matter was heard before his Honour Justice Jackson who stood the matter down in order for the parties to liaise in relation to the final terms of an order providing for further directions. The further directions included referring the matter to mediation. Following the provision of an agreed order to his Honour Justice Jackson, the parties were asked by the Court to reappear before his Honour on 13 June 2018.

On 13 June 2018 orders were made granting the orders sought in the Applications and the Commercial List Application including that Mr Whyte represent the interests of the LM First Mortgage Income Fund in the proceedings and that the ICPAIF and the CPAIF be represented by Mr Said Jahani of Grant Thornton. The interests of LMIM are to be represented by Mr John Park of FTI Consulting. Further, it was ordered that mediation between the parties take place prior to 28 September 2018.

Following discussions between the parties, it was determined that the parties did not have mutual availability prior to 28 September 2018 to attend mediation. Accordingly, amended orders were made by his Honour Justice Jackson on 4 September 2018 providing for a two day mediation to take place on 5 and 6 November 2018.

# Tucker & Cowen Solicitors.

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15 November 2018

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Paul Armit.  
Wesley Hill.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015  
'Dual Appointments' Application

We refer to the application filed by your clients on 10 October 2018 seeking directions in relation to the dual appointments in the winding up of the FMIF (the Application).

## The Rationale for the Application

It seems to our client that the Application is based on a misconception about the approach taken by our client to the receivership and winding up of the FMIF and, in particular, an incorrect perception that our client is delaying in resolving the legal proceedings on foot and the main issues in relation to the winding up.

In fact, nothing could be further from the truth. Our client has made substantial and significant progress towards resolving the various legal proceedings on foot and the main issues in the winding up of the FMIF.

Following the discontinuance of the substantial claims made by KordaMentha as trustee of the LM Managed Performance Fund this year against assets of the FMIF in proceedings 8032/14, 8034/14 and, 12716/15 our client has been in ongoing discussions with the DB Receivers about their retirement and remains confident that their retirement will occur shortly. Unfortunately, our client does not consider that he has standing to seek orders terminating the appointment of the DB Receivers. As to that, we have conveyed to you that our client would have no objection to your client seeking orders terminating the appointment of the DB Receivers.

Nonetheless, our client is proactively taking steps to resolve (or, failing that, progress expeditiously) the major legal proceedings on foot, as to which we are instructed that:-

1. Mediation of the Feeder Fund Proceeding was held on 5 and 6 November 2018 and there are ongoing settlement negotiations. Those settlement negotiations are advanced and at a sensitive stage. As has been said in separate correspondence to you, the timing of your client's application is unfortunate and, regrettably, has the potential to adversely affect those settlement discussions.
2. Orders have been made in the "EY Proceeding" (as it is referred to in Mr Park's Affidavit) directing that mediation of the dispute take place by 15 March 2019; other steps are also being taken to progress the matter before then,

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including preparation of a response by Mr Whyte (representing the plaintiff in that proceeding) to an extensive request for further and better particulars of the statement of claim, together with amendments to that statement of claim, both of which are to be delivered by 30 November 2018.

It appears from the Affidavit of Mr Park, that one of your client's criticisms of the progress of the winding up of the FMIF is of a perceived delay in making an interim distribution to members. We are instructed that it is our client's firm intention to seek Orders approving an interim distribution to members of the FMIF as quickly as possible; our client hopes to be able to do that early next year.

As you know, one of the main impediments to making any distribution has been the ascertainment of any indemnity claims against the property of the FMIF, which would naturally need to be accounted for before any distribution to members is made. The identification of any such claims for indemnity is something that is in your client's hands, in accordance with the Orders made on 17 December 2015, and we address that in further detail below. Our client does wish to know what your client intends to do, in order to procure an early distribution to members.

Our client is also concerned that there will be significant costs associated with the Application, which your client will no doubt seek to recover from the FMIF. For the avoidance of any doubt, our client should not be taken to have consented to your client's recovery of any such costs from the FMIF, and reserves his right to consider that question at the appropriate time.

Our client also does not believe that the orders sought by your client will produce any costs savings for members of the FMIF; rather, they will increase costs. The orders sought in the Application will not end the dual appointments – rather, they would allocate slightly more responsibilities to your client as opposed to our client.

Indeed, the allocation of additional tasks to your clients is likely to result in the FMIF being burdened with further costs; not least because of the need for your clients to, for example, familiarise themselves with matters such as the financial records of the FMIF.

In all of the circumstances, our client invites your client to reconsider, and discontinue the Application.

#### **Claims for indemnity from FMIF**

As your client would know, our client is working towards being in a position to make an interim distribution to FMIF members as soon as is reasonably possible.

We note that your clients called for proofs of debt in the liquidation of LMIM, with a deadline for lodgement of proofs of 2 October 2018. We also note that your client has provided to our client copies of certain proofs of debt lodged in the liquidation of LMIM by KordaMentha Pty Ltd as Trustee of the MPF, where the claims the subject of the proofs related to facilities where LMIM as Responsible Entity for the FMIF had also been involved. However, we note that none of those proofs of debt assert any claim against LMIM as RE for the FMIF.

Notwithstanding the six weeks that have already elapsed since that date, Mr Park has not given any indication as to when he intends to adjudicate upon those proofs of debt, nor has he given any indication to our client as to whether or not he has identified any Creditor Indemnity Claims, within the meaning of the Order of Jackson J made on 17 December 2015 (the December 2015 Orders).

Our client does not understand the delay in adjudicating on proofs of debt and notifying him of any claims for indemnity. In particular:

1. Your client has the benefit of the December 2015 Orders, which specifically provide your client with an indemnity from the FMIF for the costs they incur, and their remuneration, in carrying out the work they are required to perform in connection with the FMIF;
2. Our client has never denied that your client would have an indemnity for the work he performs under the December 2015 Orders in connection with the FMIF, nor has he ever suggested that he would raise any clear accounts rule or other defence to such an indemnity.
3. Following concerns raised unilaterally by your client, our client consented on 18 July 2018 to a further Order varying the December 2015 Orders, specifically to address a concern by your client about his ability to claim an indemnity for expenses from the FMIF, and so as to facilitate your client expeditiously adjudicating upon proofs of debt and identifying any indemnity claims.


We are not aware that the position of LMIM in its own right has materially changed since 18 July 2018.

In the circumstances, please let us know within the next seven days when your client expects to adjudicate upon the proofs of debt and notify our client of any indemnity claims.

We emphasise that this request is made in the interests of ensuring that our client is in a position promptly to apply to Court for approval to make an interim distribution as soon as is reasonably possible.

We look forward to your prompt response to this correspondence.

Yours faithfully



David Schwarz  
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au  
Direct Line: (07) 3210 3506

Individual liability limited by a scheme approved under Professional Standards Legislation.

# RUSSELLS

16 November 2018

Our Ref: . AJT:JTW:20180543

Your Ref: Mr Schwarz and Mr Nase

Mr David Schwarz and Mr Alex Nase  
Tucker & Cowen  
GPO Box 345  
BRISBANE 4001

By Email: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)  
[anase@tuckercowen.com.au](mailto:anase@tuckercowen.com.au)

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Dear Colleagues

**LM Investment Management Limited (in liquidation) (receivers and managers appointed)**  
**("LMIM")**

**Application for directions as to the future conduct of the winding up of LMIM and the LM Funds**  
**Supreme Court of Queensland Proceeding number 3508 of 2015**

We refer to your two letters of 15 November 2018 in respect to our client's 10 October 2018 application ("**the Application**"). Our client has considered the issues set out in that correspondence, however he does not consider it will be in the best interests of creditors and members of all of the funds to discontinue the application.

The reason for delay in respect of the winding up of LMIM and the LM Funds are as stated in Mr Park's 12 November 2018 affidavit, being the effect of the Feeder Funds Proceeding on a FMIF distribution to the Feeder Funds, the effect of the Clear Accounts Proceeding and the need for preparation of audited accounts.

The Application will reduce costs as there will be one final remuneration and expenses determination compared to the costs of multiple remuneration applications by both of our clients.

In respect of adjudication of proofs of debt, your client is aware of the status of that adjudication based on discussions with our client. The trustee of MPF has lodged proofs of debt exceeding \$78 million. Those proofs of debt need to be carefully considered as they may have a significant impact on any distribution to other members and creditors. It is also necessary to incur costs in order to complete that adjudication, the proof of debt adjudication being one of the reasons for seeking orders in respect of the budgets. Our client has raised in his 12 November 2018 affidavit the practical difficulties in carrying out this work without funds.

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In respect of the 19 November hearing, our client is prepared to seek the relief identified in paragraph 1(a) of the application at the 10 December 2018 hearing (or any later hearing if that date is not suitable), rather than seeking that relief on 19 November 2018.

Yours faithfully



**Julian Walsh**  
Special Counsel

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Mobile 0449 922 233  
JWalsh@RussellsLaw.com.au  
20180543/2555473

# Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / [www.tuckercowen.com.au](http://www.tuckercowen.com.au)

Our reference: Mr Schwarz / Mr Nase

26 November 2018

Your reference: Mr Tiplady / Mr Walsh

Principals.  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Davey.

Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.  
Marcelle Webster.

Associates.  
Emily Anderson.  
James Morgan.  
Scott Hornsey.  
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Mr Ashley Tiplady  
Russells Lawyers  
Brisbane Qld 4000

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[jwalsh@russellslaw.com.au](mailto:jwalsh@russellslaw.com.au)

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");  
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte  
Supreme Court of Queensland Proceeding No. 3508/2015

1. We refer to our letter dated 15 November 2018, and to your response dated 16 November 2018, as to the issue of progressing the proof of debt process, now that the due date for the lodgement of proofs of debt has passed.
2. We also refer to the Order made on 17 December 2015 ("2015 Orders"), which directed your client under section 601NF(2) of the Act to ascertain the debts payable by and claims against LMIM, to adjudicate those debts and claims, and to identify any claims for indemnity from the assets of the LM First Mortgage Income Fund (FMIF).
3. Our letter of 15 November 2018 requested that you inform us within seven days when your client expects to adjudicate upon the proofs of debt that have been lodged.
4. Your client declined to provide a response to that request for information, but intimated instead that he has not commenced the work involved because he is without funds. That is to the same effect as your client's affidavit, where he indicated that "one impediment" to his adjudicating the proofs of debt is "lack of funds to enable me to do so".
5. It is, however, imperative that the proof of debt process be progressed without further delay, so that the Court's approval may be sought to make a substantial interim distribution to the members of the FMIF in early 2019.
6. Such an interim distribution is inherently desirable where the members of the FMIF have been without a return for over five years. However, any application for approval is not likely to be successful unless the Court can be assured that the remaining claims against the FMIF do not exceed the funds remaining after such a distribution is made.
7. While we appreciate the financial position of LMIM in its own right, our client does not accept that it is a satisfactory explanation for your client now doing nothing to progress the proof of debt process, as he was directed to do in the 2015 Orders.

8. In particular, we refer to the following matters:

- (a) The 2015 Orders are very clear that your client is entitled to be paid, from the property of the FMIF, his appropriate remuneration and expenses for attending to the work required by the 2015 Orders in connection with the FMIF.

There can be no doubt, and our client has never disputed, that this includes his work adjudicating proofs of debt in connection with the FMIF.

- (b) Your client himself sought, by his application to the Court filed on 8 April 2015 (**Residual Powers Application**), directions to the effect that *"your client 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)."*

- (c) Your client did not in the context of the Residual Powers Application, or at any time thereafter until 12 November 2018, raise lack of funds as an impediment to carrying out the work required.

If he had done so, presumably the Court could have made different arrangements for the identification of debts or claims against the assets of the FMIF in 2015.

9. In addition, at the hearing of the Indemnity Application on 20 June 2017:

- (a) our client's 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 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 2015 Orders; and

- (ii) Mr Whyte accepts (and has always accepted) that your clients (the Liquidators of 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;

- (b) His Honour observed that, in His Honour's view, the 2015 Orders provides a mechanism for the payment to the Liquidators of such remuneration and expenses from the property of the FMIF.

10. Immediately following that hearing on 22 June 2017, you wrote to us and specifically acknowledged that Mr Whyte, through his 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"*.

11. In all of these circumstances, our client fails to see why your client is not now progressing the proof of debt process, in accordance with the 2015 Orders.

MPF Proofs

12. We understand that KordaMentha Pty Ltd as trustee of the MPF ("the MPF trustee") has lodged a series of proofs of debt ("MPF Proofs"), including certain proofs in an aggregate sum of \$78,059,556.11, copies of which have been provided to our client by your client, as mentioned in our letter of 15 November 2018.
13. We understand that the MPF Proofs are by far the most substantial proofs that have been lodged, and that the other proofs of debt are regarded as easy to deal with, comprising claims by advisors against LMIM only (personal claims, not claims for which any indemnity from the FMIF is available), claims by investors for their investment (and thus not creditors), and other relatively small proofs.
14. We note the comment in your letter dated 16 November 2018 that the MPF Proofs need to be carefully considered. We agree.
15. However, our client understands that the claims advanced by the MPF Proofs are for breaches of trust by LMIM as trustee of the MPF.
16. We also note that, on 17 October 2018, Minter Ellison, the solicitors for the MPF Trustee, wrote to Clayton Utz, the solicitors for Mr Hayes and Mr Connelly (the DB Receivers), observing that the MPF Proofs do not assert any claim against LMIM as responsible entity of the FMIF.
17. As such, our client is not presently aware of the basis for any claim to an indemnity against the assets of the FMIF in relation to the MPF Proofs.
18. Further, the party who might ordinarily be expected to fund the cost of any such indemnity claim (i.e. the MPF trustee) has disavowed such a claim.
19. Nonetheless, our client expects that the Court will require some assurance of the position, before approving any interim distribution.
20. That requires your client, as a first step, to adjudicate the proofs of debt that have been lodged, and to identify any Creditor Indemnity Claims to our client under the 2015 Orders.
21. In all the circumstances, our client does not consider that it is necessary or appropriate for your client to await the outcome of the hearing on 10 December 2018 before doing so.

Further request

22. Our client, in his capacity as the person responsible for ensuring that the FMIF is wound up in accordance with its constitution, has instructed us to request that your client confirm that he will progress his adjudication of the proofs of debt (and, in particular, the MPF Proofs), and inform our client of when your client intends to complete that adjudication.
23. Our client requests your response to this request by Thursday, 29 November 2018.
24. In the event your client declines to respond by Thursday, 29 November 2018, or if the response is not satisfactory to our client, our client intends to file an application, returnable on 10 December 2018, for directions as to the adjudication of the proofs of debt.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Schwarz', with a long, sweeping horizontal stroke extending to the right.

David Schwarz  
Tucker & Cowen

Direct Email: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)  
Direct Line: (07) 3210 3506

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# RUSSELLS

29 November 2018

Our Ref: AJT:JTW:20180543

Your Ref: Mr Schwarz and Mr Nase

Mr David Schwarz and Mr Alex Nase  
Tucker & Cowen  
GPO Box 345  
BRISBANE 4001

By Email: dschwarz@tuckercowen.com.au  
anase@tuckercowen.com.au

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Dear Colleagues

**LM Investment Management Limited (in liquidation) (receivers and managers appointed)  
("LMIM")**

**Application for directions as to the future conduct of the winding up of LMIM and the LM Funds  
Supreme Court of Queensland Proceeding number 3508 of 2015**

Thank you for your letter of 26 November 2018.

Might we just clarify with you that your client's position is as stated in paragraph 8(a) of your letter?

Specifically, when you say that there is no doubt that our client is entitled to be paid appropriate remuneration and expenses for attending to the work required by the 2015 Orders in connection with the FMIF, that includes all of the costs and remuneration of our client in assessing the proofs of debt generally as to whether or not they will be the subject of claims for indemnity out of the FMIF.

Our client has been proceeding to date on the basis that all of their work in assessing the proofs of debt which have been lodged are in connection with the FMIF because the process is directed towards whether or not, in response to your client's request, a claim might be made against the FMIF. If your client does not accept that proposition, please let us know immediately.

In particular, does your client consider that:

1. The legal expenses our clients are incurring in responding to your client's correspondence are expenses in connection with the FMIF?
2. The costs of doing the work in paragraphs 4(a) and 4(b) of the 2015 Order are remuneration and expenses in connection with the FMIF?

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If the answer to those questions is no, will your client agree that these are corporate costs properly claimable against the Funds generally and to be borne in a proportionate amount between the FMIF, AIF and ASPF?

If not, there is no available funding to adjudicate upon the proofs of debt received.

To assist your client, in respect of the MPF Proofs, on 22 November 2018, the MPF Trustees confirmed they would not be pressing an indemnity claim against the FMIF.

Based on this review we have requested additional information to determine those claims where sufficient information did not exist to either confirm the claim against FMIF or the quantum of any such claim. Those requests are based on the need to determine if there is any potential indemnity claim against FMIF and the amount of such or to determine the applicable proportion of a claim where it is apparent the claim is attributable to one or more Funds. Those requests for information were issued on 23 November 2018 and as such information is due before 14 December 2018.

Additionally, could you please let us know:

1. Is there any reason your client has not arranged for payment of Mr Peden QC's fees for the Indemnity Application on 19 and 20 June 2017?
2. Have the DB Receivers retired yet?

We look forward to receiving your response.

Yours faithfully



**Julian Walsh**  
Special Counsel

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JWalsh@RussellsLaw.com.au  
20180543/2562118

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 11560/16

Amended pursuant to the Order of the Registrar dated

Dated: 30.6.2017 Signed: [Signature]

Tucker & Cowen

Plaintiff:

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

AND

Defendant:

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

AMENDED CLAIM

The plaintiff claims:

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

AMENDED CLAIM

Form 2, Version 2, Rule 22

Filed on behalf of the Plaintiff

TUCKER & COWEN

Solicitors

Level 15

15 Adelaide Street

Brisbane, Qld, 4000.

Tele: (07) 300 300 00

Fax: (07) 300 300 33



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

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

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

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



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

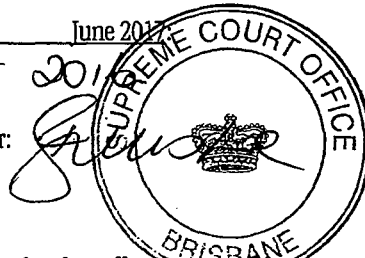
ISSUED WITH THE AUTHORITY OF THE SUPREME COURT OF QUEENSLAND

And filed in the Brisbane Registry on 9 November 2016

June 2017

9 November 2016

D/ Registrar:



To the defendant:

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

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

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

PARTICULARS OF THE PLAINTIFF:

Name: LM Investment Management Limited (Receivers and Managers Appointed) (in liquidation) (ACN 077 208 461) as responsible entity of the LM First Mortgage Income Fund ARSN 089 343 288

Plaintiff's residential or business address: C/- BDO, Level 10, 12 Creek Street, Brisbane Qld 4000

Plaintiff's solicitors name: David Schwarz  
and firm name: Tucker & Cowen, Solicitors

Solicitor's business address: Level 15, 15 Adelaide Street, Brisbane Qld 4000

Address for service: Level 15, 15 Adelaide Street, Brisbane Qld 4000

Telephone: (07) 300 300 00

Fax: (07) 300 300 33

E-mail address: dschwarz@tuckercowen.com.au



Signed:



Description: Solicitors for the Plaintiff  
Tucker & Cowen

Dated: 30 9 November 2016 June 2017

This Amended Claim is to be served

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

of: C/- FTI Consulting 'Corporate Centre One'  
Level 9  
2 Corporate Court  
Bundall Qld 4217



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

Dated 30.6.2017 Signed: [Signature] Tucker & Cowen

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 11560/16

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

AND

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

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

AMENDED STATEMENT OF CLAIM

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

Parties

I INTRODUCTION

LMIM and FMIF

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

AMENDED STATEMENT OF CLAIM  
Form 16 rr.22; 146

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

Filed on behalf of the Plaintiff  
01347306-007.docx



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

#### LMIM – Other Roles

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



6. LMIM:-

- (a) was at all material times until 16 November 2012, the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("WFMIIF");
- (b) is and was at all material times, the RE of the LM Currency Protected Australian Income Fund ARSN 110 247 875 ("CPAIF"); and the
- (c) is and was at all material times, the RE of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("ICPAIF"),

together, known as the "Feeder Funds", each of which was a registered managed investment scheme under the Act.

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

Management of the FMIF by LMIM

LMA

8. LM Administration Pty Ltd ACN 055 691 426 ("LMA"):

- (a) is and was at all material times a company duly incorporated according to law;
- (b) at all material times conducted its operations as the trustee of various trusts, including the LM Administration Trust;
- (c) was placed into voluntary administration on 19 March 2013, at which time Mr Park and Ms Muller were appointed as its administrators;
- (d) was placed into liquidation on 26 July 2013, at which time Mr David Clout and Ms Lorraine Smith were appointed as its liquidators.

9. At all material times, LMA:

- (a) had no business other than in relation to the managed investment schemes and trusts managed by LMIM as responsible entity and trustee, or trustee, as the case may be;
- (b) shared the same place of business as LMIM;
- (c) had as its sole director Mr Peter Drake, who was also:
  - (i) the Executive Director and Chief Executive Officer of LMIM; and
  - (ii) a beneficiary of the various trusts pursuant to which LMA carried out its operations, including the LM Administration Trust;
- (d) had as its sole shareholder Mr Peter Drake, who was also the sole ultimate owner of LMIM;

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

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

#### The Trust

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

#### Particulars:

- (a) LMIM held assets as trustee for the members of the FMIF;
- (b) LMIM, by its agent, held assets as trustee for the members of the FMIF;
- (c) LMIM held rights and interests in the property of the FMIF as trustee for the members of the FMIF.

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

- (a) the Product Disclosure Statement for the FMIF as it was from time to time;
- (b)(a) the successive deeds containing the Constitution of the FMIF and the terms of the Trust ("the Constitution");

#### Particulars.

The deeds were relevantly as follows:

- (i) For the period 31 May 2007 to 10 April 2008, the Replacement Constitution of the FMIF executed by LMIM as a deed and dated 31 May 2007; and
  - (ii) At all material times from 10 April 2008, the Replacement Constitution of the FMIF executed by LMIM as a deed and dated 10 April 2008, and as amended from time to time.
- (e)(b) the Corporations Act to the extent to which it applied the obligations of a Responsible Entity of a managed investment fund.

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

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

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

**Particulars.**

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

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

Particulars.

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

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

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

Particulars.

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

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

Particulars.

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

- ~~13.15. Pursuant to section 601GA(2)(b) of the Act, the RE's and upon that section's true construction, LMIM's rights to payment of the RE Management Fee, or to be indemnified out of the property of the FMIF for liabilities or expenses incurred in relation to the performance of its duties, are:~~

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

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

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

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

(a) the performance to which the cost relates;

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

#### The Custody Agreement

~~16.23.~~ PTAL was at all material times the custodian of the property of the FMIF and the agent of LMIM, pursuant to the terms of a Custody Agreement between PTAL and LMIM dated 4 February 1999 (as amended from time to time) ("Custody Agreement").

~~17.24.~~ The Custody Agreement included material terms to the following effect:-

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

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

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

Administration Agreement Services Agreements with LMA-

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

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

("Services Agreements").

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

Particulars.

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

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

- (a) (clause 2.1) LMA agreed to supply Resources, meaning:
  - (i) the Staff, being staff employed by or engaged as a consultant to LMA or its related bodies corporate who are provided as to all or part of their time to LMIM to perform the Functions under the Resources Agreement; and



- (ii) the Other Resources, being premises, computer systems and other equipment, software, know-how and other tangible and intangible property owned, leased, licensed or otherwise procured by LMA or a related body corporate or associate of LMA and used by its staff to assist LMA to perform the Functions;
- (b) The Functions mean:
  - (i) LMIM's corporate administration other than in connection with the FMIF;
  - (ii) all functions performed or services provided by LMIM in respect of administering or winding-up the Trusts or a Sub-Trust (or any of them) and caring for and preserving any property or assets of the FMIF;
  - (iii) all functions performed or services provided by LMIM in relation to self-custody of the assets of the FMIF;
  - (iv) any other functions in respect of which LMIM may require Resources from time to time and in respect of which LMA is willing and able to provide Resources, whether or not in connection with the FMIF;
- (c) (clause 4.2) LMIM agreed to pay a Resources Fee ("Resources Fees"), being (in relation to the FMIF) either:
  - (i) subject to review by the Administrators, the management fee payable to LMIM under the Constitution for the relevant period less any amount of the management fee that LMIM reasonably considers should be withheld to pay, or provide for, other actual or contingent liabilities it has incurred or will incur in its personal capacity; or
  - (ii) any other fixed or variable fee agreed by the parties from time to time;
- (d) (clauses 4.1 and 4.3) LMIM will calculate the Resources Fee within 5 Business Days of the last Business Day of every calendar month (or such other period as may be agreed by the parties), will notify LMA of the Resources Fee within one Business Day thereafter or as the parties determine, and will pay the Resources Fee within two Business Days of being notified or as the parties determine.

LMIM's outstanding financial obligations under certain facility agreements.

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

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

**Particulars**

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

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

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

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

~~(e)~~

**Circumstances of the FMIF**

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

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

**Particulars**

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

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

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

LMIM's duties to members of the FMIF Duties

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

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

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

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

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

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

(b) by s.601FC(1)(h) of the Act to comply with the compliance plan of the FMIF and thereby:

(i) to ensure that the Scheme Property is valued, as necessary, at intervals appropriate to the nature of the property;

(ii) to obtain an updated valuation, unless the RE considers that an updated valuation would serve no useful purpose, where a loan term is extended or a loan is otherwise varied; or

(iii) to obtain an updated valuation, unless the RE considers that an updated valuation would serve no useful purpose, for commercial loans at 24 month intervals and construction loans at 12 month intervals.

Particulars.

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

(A) The Replacement Compliance Plan dated 28 November 2008;

(B) The Replacement Compliance Plan dated 13 March 2009, as later modified by the Compliance Plan Modification dated 13 March 2009;

(C) The Replacement Compliance Plan dated 16 March 2011.

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

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

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

~~24.37.~~ The terms of the KPG Loans Assignment, including as subsequently varied from time to time, included terms to the following effect:-

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

(b) LMIM as trustee of the MPF agreed to pay the KPG Consideration by 28 August 2011.

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

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

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

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

~~41.~~ Either:

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

## II PRE-PAYMENT OF MANAGEMENT FEES

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

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

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

Particulars.

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

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

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

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

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

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

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

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

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

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

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

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

(b) account for interest to the FMIF on any such amount.

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

Particulars.

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

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

Particulars.

The Plaintiff repeats the particulars in paragraph 42 above.

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

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

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

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

Breach of Equitable and Statutory Duties

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

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

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

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

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

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

#### Loss

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

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

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

38. Further to the immediately preceding paragraph:-

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



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

Particulars.

- ~~(a) Particulars of the loss will be provided by way of an expert report.~~
- (a) The loss comprised the loss of use of funds, or alternatively lost interest, both of which are to be calculated by applying the Pre-Judgment Interest Rate to the balance of the LMA Account from day to day.
- (b) Further particulars will be provided.

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

III OVERPAYMENT OF THE RE MANAGEMENT FEE

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

- (a) discharging the RE Management Fee which were payable to LMIM; and
- (b) discharging the Service Fees which were payable by LMIM to LMA.

Particulars

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

- (i) \$15,410,762 in the financial year ended 30 June 2009;
- (ii) \$8,995,455 in the financial year ended 30 June 2010;
- (iii) if the position is as alleged in paragraph 41(a) above, \$10,997,188 in the financial year ended 30 June 2011;
- (iv) if the position is as alleged in paragraph 41(a) above, \$9,103,864 in the financial year ended 30 June 2012;
- (v) if the position is as alleged in paragraph 41(a) above, \$4,519,156 for the period from 1 July 2012 to 18 March 2013.

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

- ~~(a) \$15,410,762 in the financial year ended 30 June 2009;~~
- ~~(b) \$8,995,455 in the financial year ended 30 June 2010;~~
- ~~(c) \$10,997,188 in the financial year ended 30 June 2011;~~
- ~~(d) \$9,103,864 in the financial year ended 30 June 2012.~~

Overvaluation of the Net Fund Value

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

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

- ~~(a) generally obtain regularly updated external valuations of all Secured Properties; and~~
- ~~(b) did not reduce the value of the Scheme Property in its financial accounts to reflect any estimated shortfall in recovery of the loans which comprised Scheme Property.~~

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

- ~~(a) the value of the real property security assets securing a significant number of the loans made on behalf of the FMIF Secured Properties were significantly overvalued in the accounts of the FMIF, such that the realisable value of the Secured Properties was insufficient to meet the obligations under the Borrower's loan facility;~~
- ~~(b) a significant number of the loans made on behalf of the FMIF were in default, for non-payment or were otherwise impaired;~~
- ~~(c) as a consequence, the value of the Scheme Property (and thus the Net Fund Value) was materially overstated in the accounts of the FMIF.~~

Particulars:

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

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

~~(a) the RE Management Fee and the Service Fees would have been calculated at proportionately lower amounts;~~

~~(b) the payments from the property of the FMIF for the apparent purpose of paying these fees would have been proportionately lower amounts.~~

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

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

~~44.60.~~ In the premises of the matters set out in paragraph ~~43.59~~, LMIM was aware, or ought reasonably to have been aware, of the matters set out in paragraphs ~~41.57~~ and ~~42.58~~ above.

Payments by MPF

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

~~(a) in the financial year ended 30 June 2010, in aggregate of approximately \$51,000; and~~

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

~~("MPF Prepaid Service Fee Payments").~~

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

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

Breach and loss

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

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

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

Loss

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

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

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

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

50. ~~Further and in the alternative, if:~~

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

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

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

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

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

#### **Particulars.**

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

#### **Payment of IV AGENCY PAYMENTS AND MSA LOAN MANAGEMENT FEES**

##### **Background**

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

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

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

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

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

#### Agency Payments

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

#### Particulars

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

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

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

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

#### Particulars.

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

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

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

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

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

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

Particulars.

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

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

74. The Agency Payments were:

- (a) separate and in addition to the Service Fees and the Resources Fees, the MSA Loan Management Fees (defined in paragraph 76 below) and the RE Management Fee; and  
(b) not specified in the Constitution as a fee to which LMIM was entitled, or as a cost for which LMIM is entitled to be indemnified.

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

LMA Management Services Agreements

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

- (a) LMA was engaged to perform services, including as an agent exercising powers under the security for the loan in question ("Loan Management Services"); and  
(b) PTAL agreed to pay service fees ~~(also~~ ("MSA Loan Management Fees"), being comprising one or more of the following fees:

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

Particulars.

Particulars of the Management Services Agreements”)- are provided in the Consolidated Particulars at paragraph 70.

Particulars:

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



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

Particulars.

- (a) PTAL was appointed as agent of LMIM pursuant to the Custody Agreement pleaded in paragraphs 16 and 17.
- (b) By reason of clauses 3.1 and 4.1 of the Custody Agreement and the facts pleaded in paragraph 76 above, it is to be inferred that PTAL executed the Management Services Agreements on the instructions of LMIM and as its agent.

78. The MSA Loan Management Fees were:

- (a) separate and in addition to the Service Fees and the Resources Fees, the Agency Payments and the RE Management Fee; and
- (b) not specified in the Constitution as a fee to which LMIM was entitled, or as a cost for which LMIM is entitled to be indemnified.

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

Payments

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

Particulars:

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

~~58-81. In relation to the financial year ended 30 June 2012, LMIM caused LMA to be paid Loan Management Fees in the amount of \$4,817,414 to be paid at its direction Agency Payments and, further or in the alternative, MSA Loan Management Fees, from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.~~

Particulars.

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

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

~~59-82. In relation to the period From 1 July 2012 until 28 February 2013, LMIM caused LMA to be paid Loan Management Fees in the amount of \$2,304,636 to be paid at its direction Agency Payments and, further or in the alternative, MSA Loan Management Fees, from the property of the FMIF, comprising fees (including fees charged by LMA to LMIM) for the performance by LMIM or its agent LMA of loan management services or services relating to the sale of real estate assets for the FMIF.~~

Particulars.

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

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

MPF Loan Management Fee Payments

~~60. Between and including 10 November 2010 and 25 May 2011, LMIM as trustee of the MPF caused further payments to be made to LMA from the assets of the MPF in the sum of \$3.284million ("MPF Loan Management Fee Payments").~~

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

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

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

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

Particulars.

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

(b) Further particulars will be provided.

*Breach of Equitable and Statutory Duties—Agency Payments Unauthorised*

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

85. In the premises of the immediately preceding paragraph:

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

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

63. In the financial year ended 30 June 2011,

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

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

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

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

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

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

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

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

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

*Breach - MSA Loan Management Fees Unauthorised*

87. In the premises of paragraphs 13(d), 13(h)(i), 13(h)(ii), 17 to 22, 77 and 79 above, no agreement or arrangement for the payment of the said MSA Loan Management Fees from the property of the FMIF were of any legal effect.

88. In the premises of the immediately preceding paragraph:

(a) LMIM had no entitlement to an indemnity from the property of the FMIF for any of the liabilities which it incurred to PTAL or LMA under the Management Services Agreements for the MSA Loan Management Fees; and

(b) payment of any of the MSA Loan Management Fees from the property of the FMIF was not otherwise authorised by or in accordance with the Constitution or the Act.

89. In the premises, the actions of LMIM in paying each of the MSA Loan Management Fees from the property of the FMIF were in breach of the duties set out in paragraphs 32(a) and 33(c) above.

*Breach - Agency Payments and MSA Loan Management Fees Not Properly Incurred*

90. At all material times, and in the premises of paragraphs 13(h)(i), 26 and 27 above, LMIM had already engaged LMA under a Services Agreement and, later, the Resources Agreement, to perform

services which included loan management services and services relating to the sale of real estate assets for the FMIF.

91. At all material times, in relation to each Borrower in relation to whom Agency Payments and, further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), the Borrower was in default of their loan from the FMIF.
92. At all material times, in relation to each Borrower in relation to whom Agency Payments and, further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), LMIM was aware, or ought reasonably to have been aware, that there was a real risk that there would be a shortfall in recovery under that loan such that the said Agency Payments and, further or in the alternative, MSA Loan Management Fees would not be recoverable from the said Borrower, after accounting for principal and interest.

Particulars

It is to be inferred that LMIM was so aware from:

- (a) The matters pleaded in paragraph 91 above; and
- (b) Further particulars will be provided in due course.
93. The amount of the Agency Payments and, further or in the alternative, MSA Loan Management Fees was not calculated by reference to the cost to LMIM or LMA of providing the services for which they were charged.
94. At all material times from the execution of the Resources Agreement, the cost to LMIM and LMA of providing the services for which the Agency Payments and, further or in the alternative, MSA Loan Management Fees were charged, including the salary of each fee earner whose time was included in the calculation thereof, was separately recovered from the property of the FMIF as a component of the Resources Fee.
95. At all material times, and in the premises of paragraph 8(c) and 76(c) above:
- (a) prior to 19 March 2013, LMIM was entitled to instruct PTAL to terminate any of the Management Services Agreements on seven days' notice;
- (b) on and from the appointment of administrators to LMA on 19 March 2013, LMIM was entitled to instruct PTAL to terminate any of the Management Services Agreements without prior notice;

96. If LMIM had instructed PTAL as pleaded in the immediately preceding paragraph:
- (a) PTAL would have complied with that instruction and given notice to LMA terminating the said Management Services Agreement either on seven days' notice, or immediately, as the case may be;
  - (b) LMA would have continued to provide the loan management services and services relating to the sale of real estate assets for the FMIF pursuant to the Services Agreements (or, later, the Resources Agreement).
97. In the premises of the matters set out in paragraphs 84 to 96 above, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in LMIM's position:-
- (a) would not have or caused PTAL to have entered into any of the Agent's Indemnities or any of the Management Services Agreements in terms permitting the said Agency Payments and the MSA Loan Management Fees to be charged;
  - (b) would not have charged any of the said Agency Payments to PTAL;
  - (c) would not have caused any of the said Agency Payments or any of the MSA Loan Management Fees to be paid from the property of the FMIF;
  - (d) further and in the alternative, would subsequently:
    - (i) have caused each of the Agent's Indemnities to be varied so as not to allow for the said Agency Payments to be charged to PTAL, or alternatively would have ceased charging the said Agency Payments to PTAL;
    - (ii) have caused PTAL to terminate each of the Management Services Agreements.
98. In the alternative, a professional remunerated trustee of a financially stricken investment unit trust, an ordinary prudent person of business in managing similar affairs of his or her own, or a reasonable person in LMIM's position, would:
- (a) have charged Agency Payments to PTAL in a lower amount;
  - (b) have negotiated, or subsequently renegotiated the terms of each of the said Loan Management Agreements to provide for lower fees.
99. In the premises of the matters set out in paragraphs 84 to 97 above, LMIM:
- (a) in relation to each of the Agent's Indemnities and the payment of each of the said Agency Payments, preferred its own interests to the interests of the members of the FMIF;

- (b) in relation to each of the Agent's Indemnities, each of the said Agency Payments, each of the Management Services Agreements, and each of the said MSA Loan Management Fees, failed to act in the best interests of the members of the FMIF.

100. In the premises of paragraphs 86, 89, 97, 98 and 99 above, the actions of LMIM were in a breach of each of the Equitable Duties and each of the Statutory Duties.

Loss to the FMIF

~~67-101.~~ If LMIM had not acted in breach of the Equitable Duties and the Statutory Duties, and had properly performed all of its duties as trustee and RE of the FMIF:-

- (a) it would not have entered into any of the Agent's Indemnities in terms which permitted the said Agency Payments to be charged by it to PTAL;
- ~~(a)~~ (b) it would not have entered into any of the Management Services Agreements, or caused PTAL to do so;
- (c) alternatively to sub-paragraphs (a) and (b), it would have:
- (i) caused each of the Agent's Indemnities to be varied so as not to allow for the said Agency Payments to be charged to PTAL;
- (ii) caused PTAL to terminate each of the Management Services Agreements;
- (d) it would have itself or would have caused LMA to carry out each of the services the subject of the Agent's Appointments and the Management Services Agreements, for no additional expense to the FMIF;
- (e) none of the said Agent's Payments or the said MSA Loan Management Fees would have been paid from the property of the FMIF.
- ~~(b)~~ it would not have caused LMA to be paid any Loan Management Fees;
- ~~(c)~~ the FMIF would have had the benefit of the amounts of the Loan Management Fees which were paid.

~~68-102.~~ Further to the immediately preceding paragraph:-

- (a) LMIM would have applied the amount of the said Agent's Payments and the MSA Loan Management Fees which were paid to LMA instead to reduce the debts of the FMIF from time to time; and
- (b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.

103. In the case of each Borrower in relation to whom Agency Payments and, further or in the alternative, MSA Loan Management Fees were paid (as pleaded in paragraphs 80 to 83 above), there has been a shortfall in recovery under their loan, such that there has been no recovery from the Borrower of the said Agency Payments and, further or in the alternative, MSA Loan Management Fees, after accounting for principal and interest.

69-104. In the premises, the FMIF was depleted and thereby suffered loss caused damage by LMIM's breaches of trust and contraventions of the Act as pleaded above.

#### Particulars

The loss suffered by the FMIF included:-

- (a) The-If the position is as alleged in paragraph 41(a) above, the amount of \$12,503,56613,720,167.00, being the amount of the Agent's Payments and, further or in the alternative, the MSA Loan Management Fees which were paid to LMA pleaded in paragraphs 56, 58 and 59, assuming that the MPF Loan Management Fee Payments had the effect ascribed to them in the accounts of the caused by LMIM to be paid from the FMIF as pleaded in paragraph 61 above (which is not admitted), paragraphs 80 to 82(a) above.
- (b) Interest on that amount, at the rates of interestPre-Judgment Interest Rate from time to time set out in paragraph 19 above, or alternatively at such rate or rates as the Court considers appropriate.
- (c) Further particulars will be provided.

#### V PAYMENTS TO FEEDER FUNDS

##### *Background*

70-105. In the financial year ended 30 June 2010, LMIM as trustee of the MPF made various payments for the benefit of each of and if the Feeder Fundsposition is as alleged in paragraph 41(a) above. LMIM as trustee of the MPF made Feeder Fund Payments in the aggregate amount of approximately \$2,500,000.

71-106. In the financial year ended 30 June 2011, LMIM as trustee of the MPF made various payments for and if the benefit of each of the Feeder Funds position is as alleged in paragraph 41(a) above. LMIM as trustee of the MPF made Feeder Fund Payments in the aggregate amount of \$10,431,836 (together with the payments referred to in paragraph 70 above, the "Feeder Fund Payments").

72. The Feeder Fund Payments were recorded by LMIM in the accounts of the FMIF as being in partial satisfaction of the KPG Consideration and the Lifestyle Consideration.



*Breach of Equitable and Statutory Duties*

~~73-107.~~ If the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded ~~If the position is as alleged in paragraph 72 above (which is not admitted),~~ 41(a) above, in respect of each of the Feeder Fund Payments made from time to time:-

- (a) the payment was not made in satisfaction of any amount presently due and payable by LMIM as RE of the FMIF to the Feeder Fund in question; and
- (b) the payment was not otherwise authorised by or in accordance with the Constitution, by the PDS; or by the Act.

~~74-108.~~ In respect of each of the Feeder Fund Payments, if they had the effect ascribed to them in the accounts of the FMIF ~~If the position is as pleaded~~ alleged in paragraph 72 41(a) above ~~(which is not admitted)~~, LMIM by making the payment:-

- (a) preferred the interests of the members of the Feeder Fund in question to the interests of the members of the FMIF; and
- (b) further and in the alternative, preferred its own interests as a member of the FMIF to the interests of the other members of the FMIF.

~~75-109.~~ In the premises, if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded ~~position is as alleged in paragraph 72~~ 41(a) above ~~(which is not admitted)~~, the payment of the Feeder Fund Payments was a breach of, LMIM breached:-

- (a) each of the Equitable Duties and;
- ~~(a)~~ (b) each of the Statutory Duties; and
- (c) its further duty under s.601FC(1)(d) of the Act to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly.

*Loss*

~~76-110.~~ If the position is as alleged in paragraph 41(a) above, LMIM as RE of each of the Feeder Funds did not repay any of the Feeder Fund Payments to the FMIF.

~~77-111.~~ If LMIM had properly performed all of its duties as trustee and RE of the FMIF, and ~~if~~ if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF position is as pleaded alleged in paragraph 72 41(a) above ~~(which is not admitted)~~:-

- (a) LMIM would not have caused the amounts of each of the Feeder Fund Payments to be paid for the benefit of the Feeder Funds;

(b) the FMIF would have had the benefit of the amounts of each of the Feeder Fund Payments.

~~78. Further to the immediately preceding paragraph:-~~

~~(a) LMIM would have applied the amounts of the Feeder Fund Payments to reduce the debts of the FMIF from time to time; and~~

~~(b) the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.~~

~~79-112.~~ In the premises, and if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF position is as pleaded ~~alleged~~ in paragraph 7241(a) above (which is not admitted), the FMIF suffered loss caused by LMIM's breaches of trust and contraventions of the Act as pleaded above.

#### Particulars.

The loss suffered by the FMIF included:-

(a) The amount of approximately \$12,931,836, being the amount of the Feeder Fund Payments.

(b) Interest on that amount, at the ~~rates of interest~~ Pre-Judgment Interest Rate from time to time ~~set out in paragraph 19 above, or alternatively at such rate or rates as the Court considers appropriate.~~

The Plaintiff claims the following relief:-

1. A declaration that by:

(a) causing the amounts to be paid in anticipation of the RE Management Fee (as defined in paragraph ~~10(d)~~ 13(f) of the Statement of Claim) ~~to be paid at its direction, from the assets/property~~ of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), in advance of performing or causing to be performed the duties and obligations in respect of which the RE Management Fee was to be payable, ~~from the assets of the FMIF;~~

(b) causing further amounts to be paid at its direction, from the assets of the FMIF, in anticipation of LMIM becoming liable to LM Administration Pty Ltd ACN 055 691 426 ("LMA") for Service Fees in relation to the FMIF additional to the RE Management Fee;

- (c) further and in the alternative, causing the Service Fees and the Resources Fees (as defined in paragraphs ~~18(b)~~26(b), 27(c) and ~~28~~42 of the Statement of Claim) to be prepaid to LMA, from the assets of the FMIF, in circumstances where there was already a debit balance in the LMA Account (as defined in paragraph 42 of the Statement of Claim).

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

2. A declaration that, by failing to cause updated independent valuations to be obtained of the real property security assets securing a significant number of the loans made on behalf of the FMIF, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act
3. A declaration that, by causing the Loan Management Fees (as defined in ~~paragraphs 54 and 57~~paragraph 65 of the Statement of Claim) to be paid to LMA from the assets of the FMIF in the financial years ended 30 June 2011, 30 June 2012 and 30 June 2013, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
4. A declaration that, by causing the Feeder Fund Payments (as defined in paragraphs ~~70 and 74~~41(a)(ii), 105 and 106 above) to be made, LMIM acted in breach of its trust of the FMIF, and in contravention of section 601FC(1) of the Act.
5. A declaration that, by reason of LMIM's breaches of trust and contraventions of the Act referred to in paragraphs 1 to 4 hereof, LMIM caused loss to the FMIF, in an amount to be assessed by this Honourable Court.
6. A declaration that LMIM's right to be indemnified from the assets of the FMIF is limited to the balance between what LMIM would otherwise be entitled by way of indemnity, and the extent of LMIM's obligation to reconstitute the FMIF for the losses caused to the FMIF by its breaches of trust or, further and in the alternative, its contraventions of the Act.
7. ~~Against~~Further and in the alternative, against the Defendant:
  - (a) equitable compensation; and
  - (b) compensation pursuant to section 1317H(1) of the Act,  
to be paid including by reference to LMIM's right to be indemnified from the assets of the FMIF, as set out in paragraph 6, but only to the extent of that right.

8. Such further or other orders as may to the Court seem meet, including orders for the adjustment of the account between LMIM and the FMIF to properly account for the liability of LMIM to reconstitute the FMIF.

8.9. Interest pursuant to s 58 of the *Civil Proceedings Act 2011* (Qld) at such rate and for such period as this Honourable Court deems fit.

9.10. Costs.

Signed:

  
Tucker & Cowen

Description: Solicitors for the Plaintiff

This pleading was settled by Mr Derrington of Queens Counsel with Mr Ananian-Cooper of Counsel.

The amendments to this pleading were settled by Mr McKenna of Queens Counsel with Mr Ananian-Cooper of Counsel.

**NOTICE AS TO DEFENCE**

Your defence must be attached to your notice of intention to defend.

Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 11560/16

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

AND

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

ORDER

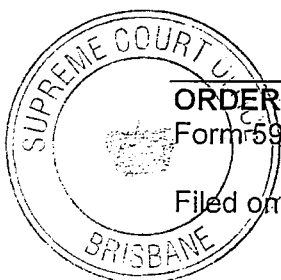
Before: Jackson J

Date: 25 July 2018

Initiating document: Application filed 20 July 2018

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 500(2) of the *Corporations Act* 2001 (Cth) the Plaintiff has leave *nunc pro tunc* to commence and to proceed with this proceeding against the Defendant, being LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 (**LMIM**).
2. A direction pursuant to section 59 of the *Trusts Act* 1973 (Qld) that:-
  - (a) the interests of LMIM in its capacity as responsible entity of the LM First Mortgage Income Fund (**the FMIF**) as Plaintiff have been and continue to be represented in these proceedings by Mr David Whyte, in his capacity as the court appointed receiver of the property of the FMIF and as the person responsible for ensuring that the FMIF is wound up pursuant to its constitution by the order of Dalton J made in proceedings numbered 3383/2013 on 21 August 2013;




ORDER  
Form 59 R.661

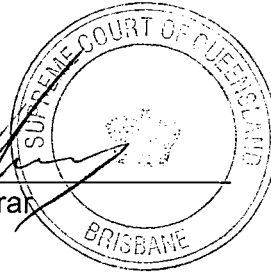
Filed on behalf of the Plaintiff

Tucker & Cowen Solicitors  
Level 15, 15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 3003 0000  
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- (b) the interests of LMIM in its own capacity as Defendant be represented in this proceeding by the liquidator of LMIM, Mr John Park.
3. That the Plaintiff's costs and expenses of and incidental to this Application be paid on the indemnity basis out of the FMIF.
4. That this proceeding be stayed until further order of the Court.

Signed:

  
Deputy Registrar



SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE  
NUMBER: 13534/16

Amended pursuant to Rule 378 of the Uniform Civil Procedure Rules 1999 (Qld).

Dated: 21 June 2018

Signed: *Gadens*

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

AND

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

AND

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

AND

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

AND

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

AND

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

**SECOND FURTHER AMENDED STATEMENT OF CLAIM**

SECOND FURTHER AMENDED STATEMENT OF CLAIM  
Filed on Behalf of the Plaintiff  
Form 16, Version 2  
Uniform Civil Procedure Rules 1999  
Rules 22, 146

BNEDOCS 23235893\_1.DOC

GADENS LAWYERS  
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BRISBANE QLD 4000  
Phone No: 07 3231 1666  
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SZC/ISO:201619858

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

#### **Parties**

1. LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ACN 077 208 461 (“**LMIM**”):
  - (a) is and was at all material times a company duly incorporated according to law;
  - (b) is and was at all material times the responsible entity (“**RE**”) of the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (“**FMIF**”), a registered managed investment scheme under the *Corporations Act 2001* (“the **Act**”);
  - (c) was placed into voluntary administration on 19 March 2013; and
  - (d) was placed into liquidation on 1 August 2013, and John Richard Park and Ginette Dawn Muller of FTI Consulting were appointed as its joint and several liquidators.
2. Pursuant to Orders of Dalton J dated 21 August 2013 (“the **Orders**”), LMIM was directed to wind up the FMIF, subject to, inter alia, the appointment of Mr David Whyte referred to in paragraph 3 below.
3. Pursuant to the Orders, Mr David Whyte:
  - (a) was appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that the FMIF is wound up in accordance with its Constitution;
  - (b) was appointed pursuant to s 601NF(2) of the Act as receiver of the property of the FMIF;
  - (c) has, in relation to the property of the FMIF, the powers set out in s 420 of the Act;
  - (d) is authorised to bring, defend or maintain any proceedings on behalf of the FMIF in the name of LMIM as is necessary for the winding up of the FMIF in accordance with clause 16 of its Constitution; and
  - (e) is entitled to bring and brings these proceedings in the name of LMIM as RE of the FMIF.

#### **The Defendants**

4. LMIM:
  - (a) is and was at all material times the RE of the LM Currency Protected Australian Income Fund ARSN 110 247 875 (“**CPAIF**”);
  - (b) was at all material times until 16 November 2012 the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 (“**WFMIF**”); and



(c) is and was at all material times the RE of the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("**ICPAIF**"),

(together, known as the "**Feeder Funds**").

5. At all material times each of the funds constituting the Feeder Funds was a unit trust and a registered managed investment scheme under the Act.
6. On 16 November 2012, the RE of the WFMIF changed from LMIM to Trilogy Funds Management Limited (**Trilogy**), and thereby and pursuant to s.601FS of the Act the rights, obligations and liabilities of LMIM in relation to the WFMIF become rights, obligations and liabilities of Trilogy, except for:
  - (a) any right of LMIM to be paid fees for the performance of its functions before it ceased to be the RE of the WFMIF; and
  - (b) any right of LMIM to be indemnified for expenses it incurred before it ceased to be the RE of the WFMIF; and
  - (c) any right, obligation or liability that LMIM had as a member of the WFMIF; and
  - (d) any liability for which LMIM could not have been indemnified out of the property of the WFMIF if it had remained the RE of the WFMIF.
7. At all material times from 16 November 2012, the RE of the WFMIF was Trilogy.
8. On 18 October 2013, LMIM determined to wind up the CPAIF under s.601NC of the Act.
9. On 18 October 2013, LMIM determined to wind up the ICPAIF under s.601NC of the Act.
10. On 16 November 2015, Gayle Dickerson and Said Jahani of Grant Thornton were appointed by Custom House Currency Exchange (Australia) Pty Ltd ("**Custom House**") as joint and several receivers and managers of LMIM in its capacity as RE of the CPAIF and the ICPAIF pursuant to security interests registered on the Personal Property Securities Register in favour of Custom House.

#### Custody Arrangements – the Feeder Funds

##### 11. Pursuant to section 601FC(2) of the Act:

- (a) the responsible entity for the CPAIF has held at all material times and continues to hold the scheme property of the CPAIF on trust for the unitholders in the CPAIF;
- (b) the responsible entity for the WFMIF has held at all material times and continues to hold the scheme property of the WFMIF on trust for the unitholders in the WFMIF;

(c) the responsible entity for the ICPAIF has held at all material times and continues to hold the scheme property of the ICPAIF on trust for the unitholders in the ICPAIF.

12. At all material times, and pursuant to section 601FB(1) of the Act, each of the CPAIF, the WFMIF and the ICPAIF were governed by constitutions, each of which includes terms to the following effect:

(a) (ESTABLISHMENT OF TRUST – Appointment of Custodian) The RE may, but is not obliged to, appoint a Custodian as agent to hold the Scheme Property on behalf of the RE, in accordance with the terms and conditions of a Custody Agreement.

(b) (TITLE TO SCHEME PROPERTY – Custodian to hold as agent of RE) If a Custodian has been appointed, the Scheme Property will be held in the name of the Custodian as agent for the RE on the terms and conditions as detailed in the Custody Agreement.

If not, the Scheme Property will be held in the name of the RE.

#### Particulars

(i) The term pleaded in (a) is clause 2.3 of the Replacement Constitutions of the CPAIF, the WFMIF and the ICPAIF each dated 10 April 2008.

(ii) The term pleaded in (b) is clause 21.1 of the Replacement Constitution of the WFMIF, and clause 20.1 of the Replacement Constitutions of the CPAIF and the ICPAIF.

13. There was a custodian appointed to hold the scheme property of the CPAIF, namely The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) (PTAL), in the following periods:

(a) from about 1 September 2004 until about 9 April 2008;

(b) from about 30 November 2011 until about 19 February 2016.

#### Particulars

(i) PTAL was appointed custodian of the CPAIF under a Custody Agreement between PTAL and LMIM dated 4 February 1999, as amended from time to time (“Custody Agreement”).

(ii) PTAL was initially appointed as custodian of the CPAIF by an Amending Deed dated 1 September 2004.

(iii) LMIM terminated PTAL’s custody of the property of the CPAIF on about 9 April 2008, but re-appointed PTAL into that role by Amending Deed dated 30 November 2011.

(iv) Mr John Park, in his capacity as a liquidator of LMIM, caused LMIM to terminate PTAL's custody of the property of the CPAIF by letter dated 19 February 2016, with effect from 31 March 2016.

14. There was a custodian appointed to hold the scheme property of the WFMIF in the following periods:

- (a) from about 18 March 2002 until about 9 April 2008, namely PTAL;
- (b) from about 30 November 2011 until about 16 November 2012, namely PTAL;
- (c) from about 16 November until the date of this pleading, namely The Trust Company Limited ACN 004 027 749 ("TCL").

**Particulars**

- (i) PTAL was initially appointed custodian of the WFMIF under the Custody Agreement, by an Amending Deed dated 18 March 2002.
- (ii) LMIM terminated PTAL's custody of the property of the WFMIF on about 9 April 2008, but re-appointed PTAL into that role by Amending Deed dated 30 November 2011.
- (iii) In anticipation of replacing LMIM as the responsible entity for the WFMIF, and by an Amending Deed dated 1 November 2012, Trilogy appointed TCL as custodian of the property of the WFMIF under the existing Custody Deed between TCL and Trilogy dated 1 February 2005 ("Trilogy Custody Deed").

15. There was a custodian appointed to hold the scheme property of the ICPAIF, namely PTAL, in the following periods:

- (a) from about 1 September 2004 until about 9 April 2008;
- (b) from about 30 November 2011 until about 19 February 2016.

**Particulars**

- (i) PTAL was initially appointed custodian of the ICPAIF under the Custody Agreement, by an Amending Deed dated 27 September 2006.
- (ii) LMIM terminated PTAL's custody of the property of the ICPAIF on about 9 April 2008, but re-appointed PTAL by Amending Deed dated 30 November 2011.
- (iii) Mr John Park, in his capacity as a liquidator of LMIM, caused LMIM to terminate PTAL's custody of the property of the ICPAIF by letter dated 19 February 2016, with effect from 31 March 2016.

16. The Custody Agreement between LMIM and PTAL included at all material times material terms to the following effect:-

- (a) (Clauses 2.1 and 2.2) LMIM appoints PTAL to provide custodian services on the terms of this agreement. PTAL accepts its appointment and agrees to provide custodian services to LMIM on the terms of this agreement.
- (b) (Clause 3.1) Subject to the provisions of this agreement, PTAL agrees to custodially hold the Portfolio and Title Documents as agent for LMIM in relation to each Scheme, including the FMIF.
- (c) (Clause 1.1) 'Custodially Held' means, in relation to an asset of a Scheme held by or on behalf of PTAL under this agreement means that PTAL or the person holding the asset on PTAL's behalf has one or more of the following:-
  - (i) legal title to the asset;
  - (ii) physical possession of the asset;
  - (iii) direct control of the asset;
  - (iv) is designated as mortgagee of the asset; or
  - (v) physical possession or direct control of the essential elements of title of the asset,

where in all the circumstances this results in PTAL or the person holding the asset on PTAL's behalf having effective control of the asset for the purpose of its safekeeping (whether or not PTAL or the person holding the asset on PTAL's behalf, as the case may be, also performs other services in relation to the asset).

- (d) (Clause 1.1) 'Portfolio' means property of a Scheme Custodially Held from time to time by PTAL or a Sub-custodian pursuant to this agreement.
- (e) (Clause 1.1) 'Scheme' means those schemes listed in schedule 2 and any other scheme included by mutual agreement in writing between PTAL and LMIM, which relevantly included from time to time the schemes as particularised to paragraphs 13 to 15 above.
- (f) (Clause 4.1) LMIM is responsible for taking all decisions in relation to the Portfolio and properly communicating to PTAL Instructions in relation to the assets of the Portfolio. Subject to this agreement, PTAL must act on LMIM's Instructions in relation to any assets of the Portfolio. If PTAL does not have Instructions, PTAL is not required, subject to this agreement, to make any payment or take any other action in relation to any matter concerning any asset in a Portfolio.
- (g) (Clause 4.3) PTAL is not responsible for reviewing or advising LMIM on the Portfolio or any part of it nor for any action or omission pursuant to a decision taken or mistakenly not taken by LMIM.

- (h) (Clause 4.8) PTAL is not obliged to see whether, in exercising any of its powers or performing any of its duties under this agreement in accordance with Instructions from an Authorised Person, the Authorised Person is acting in proper exercise or performance of his powers or duties.

17. The Trilogy Custody Deed between Trilogy and TCL included at all material times material terms to the following effect:-

- (a) (Clause 2.1) Trilogy appoints TCL and TCL accepts the appointment as the custodian of the Assets of each of the Trusts on the terms and conditions of this Deed.
- (b) (Clause 1.1) 'Assets' means the assets of each of the Trusts which TCL holds from time to time for Trilogy including those which may be transferred or delivered to TCL in accordance with the terms of this Deed;
- (c) (Clause 1.1) 'Trusts' means one or more of the trusts listed in Schedule 1 and such other funds as may be agreed in writing between Trilogy and TCL, which relevantly includes the WFMIF as particularised to paragraph 14 above.
- (d) (Clause 4.1) TCL's duties and responsibilities in respect of the Assets of each Trust include, in accordance with Proper Instructions:
- (i) (sub-paragraph (a)) to enter into Contracts or effect transactions in relation to the Assets of the Trust on Trilogy's behalf;
- (ii) (sub-paragraph (b)) to hold Assets of the Trust on Trilogy's behalf;
- (e) (Clause 4.4) TCL must hold the Assets of a Trust as follows:
- (i) (sub-paragraph (c)) In the case of Securities, in an Account or in its own name. If TCL is to hold Securities in its own name it must, to the extent permitted by the issuer of the Security and relevant Government Agencies, ensure that all registers and Certificates of Title record that the Securities are held by TCL on Trilogy's behalf. In the case of Securities recorded in an Account, ownership must be clearly recorded in TCL's books as belonging to the relevant Account and not for TCL's own interest.
- (f) (Clause 1.1) 'Securities' includes units or other interests in managed investment schemes;
- (g) (Clause 7)
- (i) (sub-paragraph (a)) TCL must not effect any transactions or grant any securities involving the Assets of a Trust unless it has received Proper Instructions and must only give effect to those transactions in accordance with those Proper Instructions.
- (ii) (sub-paragraph (d)) Trilogy will only provide Proper Instructions for proper purposes and TCL is not under any obligation to verify the purposes or the propriety of any purpose for which any transaction is being effected.

## Governance of the FMIF

~~11.18.~~ At all material times, pursuant to section 601FC(2) of the Act, LMIM held the property of the FMIF on trust for its members.

### Particulars.

- (a) LMIM held assets as trustee for the members of the FMIF;
- (b) LMIM, by its agent, held assets as trustee for the members of the FMIF;
- (c) LMIM held rights and interests in the property of the FMIF as trustee for the members of the FMIF.

~~12.19.~~ The terms of the trust on which LMIM held the assets of the FMIF were those contained in, *inter alia*:

- ~~(a) the Product Disclosure Statement for the FMIF as it was from time to time;~~
- ~~(b)(a)~~ the Constitution of the FMIF;
- ~~(c)(b)~~ the Act, to the extent to which it applied the obligations of an RE of a managed investment fund, including the obligations set out in paragraphs 23 and 41 below.

~~13.20.~~ At all material times, and pursuant to section 601FB(1) of the Act, the FMIF was governed by a Constitution (hereinafter, the “**Constitution**”), which relevantly provided to the following effect:

- (a) by clause 1.1:
  - (i) ‘Member’ in relation to a Unit means the person registered as the holder of that Unit (including joint holders);
  - (ii) ‘Register’ means the register of Members maintained by the RE under clause 22;
  - ~~(i)(iii)~~ the “Responsible Entity”, or “RE” means the company named in ASIC’s records as the responsible entity of the Scheme and referred to in this document as the RE who is also the Trustee of the Scheme;
  - ~~(ii)(iv)~~ the “Scheme” means the FMIF;
  - ~~(iii)(v)~~ “Scheme Property” means assets of the Scheme;
  - (vi) ‘Unit’ means an undivided interest in Scheme Property created and issued under this Constitution;
- (b) by clauses 2.1 and 2.2, the RE is trustee of the Scheme and holds the property of the Scheme on trust for ~~m~~Members of the Scheme;
- (c) by clause 2.3, the RE has appointed PTAL The Trust Company (PTAL) Limited ACN 008 412 913 (formerly Permanent Trustee Australia Limited) (“**PTAL**”) as agent to hold the Scheme Property on behalf of the RE;

- (d) by clause 3.1, the beneficial interest in the Scheme Property is divided into Units and, unless the terms of issue of a Unit or a Class otherwise provide, all Units will carry all rights, and be subject to all the obligations of Mmembers under the Constitution;
- (e) by clause 3.2, different Classes (and sub Classes) with such rights and obligations as determined by the RE from time to time may be created and issued by the RE at its complete discretion and, if the RE determines in relation to particular Units, the terms of issue of those Units may eliminate, reduce or enhance any of the rights or obligations which would otherwise be carried by such Units.
- (f) by clause 9.1:
  - (i) Subject to the Constitution, a Unit may be transferred by instrument in writing, in any form authorised by the Law or in any other form that the RE approves;
  - (ii) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.
- (g) by clause 22.1, the RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.

21. Pursuant to the Orders of Jackson J dated 17 December 2015:

- (a) The liquidators of LMIM were directed not to carry out the functions of LMIM pursuant to clauses 9, 10 and 22 of the Constitution;
- (b) LMIM was relieved of the obligations imposed by clauses 9, 10 and 22 of Constitution;
- (c) Mr Whyte was authorised and empowered to exercise the powers of, and was made responsible for the functions of, the Responsible Entity as set out in Clauses 9, 10 and 22 of the Constitution.

~~14.22.~~ PTAL was at all material times the custodian of the assets of the FMIF, pursuant to the terms of the Custody Agreement, a Custody Agreement between PTAL and LMIM dated 4 February 1999 (as amended from time to time) ("Custody Agreement").

~~15.23.~~ At all material times, LMIM was obliged as RE and as trustee of the FMIF:

- (a) to act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;
- (b) to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly;

- (c) to ensure that all payments out of the property of the FMIF are made in accordance with its Constitution and the Act.

**Particulars**

- (i) LMIM was so obliged pursuant to section 601FC(1)(c), (d) and (k) of the Act, and pursuant to the general law of trusts.

Obligations of the RE of the FMIF upon the winding up of the FMIF

~~16.24.~~ By section 601NE of the Act, and in the premises of paragraph 2 above, LMIM as RE of the FMIF is obliged to ensure that the FMIF is wound up in accordance with the Constitution and the Orders.

~~17.25.~~ At all material times, the Constitution relevantly provided by clause 16.7 to the effect that, "[s]ubject to the provisions of this clause 16 upon winding up of the Scheme the RE must:

- (a) realise the assets of the Scheme Property;
- (b) pay all liabilities of the RE in its capacity as Trustee of the Scheme including, but not limited to, liabilities owed to any Member who is a creditor of the Scheme except where such liability is a Unit Holder Liability;
- (c) subject to any special right or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4; ..."

**Particulars.**

- (i) At all material times, the above terms were contained in the Replacement Constitution of the FMIF dated 10 April 2008.

~~18.26.~~ Further, the Constitution also included the following terms expressly by reference, or by necessary implication:

- (a) that the administration of the FMIF, including its winding up, is to be carried out pursuant to the principles of the law of trusts, except where those principles are inconsistent with the provisions of the Act concerning the obligations of an RE of a managed investment fund or the express terms of the Constitution;
- (b) that LMIM or its agent or assignee, by reference to those principles, is to be treated as a matter of accounting as having received by anticipation that part of the assets of the FMIF to which it or its agent or assignee will in due course become beneficially entitled, directly or through another party, as a Class B unitholder by anticipation, to the extent of its LMIM's unsatisfied obligation as RE and trustee of the FMIF to make good to the FMIF any breaches of trust or duty for which it is responsible;



- (c) that, by reference to those principles, and in relation to any person Unitholder who is liable to the FMIF:
- (i) that Unitholder person or their agent or assignee cannot share in the FMIF, directly or through another party, without first contributing to the FMIF by satisfying any its liability to make a contribution in aid of the FMIF; and
  - (ii) that Unitholder's person's obligation to contribute to the FMIF is treated as being in satisfaction of their or their agent or assignee's its right to share, directly or through another party, in the income or assets of the FMIF to the extent of their the Unitholder's obligation or, in other words, that Unitholder's their or their agent or assignee's right to share in the income or assets of the FMIF is appropriated in payment of its their liability to contribute to the FMIF;
- (d) that, by reference to those principles, where LMIM as RE of the FMIF has made an overpayment or wrong payment to any Unitholder, LMIM is entitled to recoup any such overpayment or wrong payment from any capital or income remaining in, or coming into LMIM's hands, to which the overpaid or wrongly paid Unitholder or their agent or assignee would otherwise be entitled.

#### Particulars

- (i) The pleaded terms are incorporated into the Constitution expressly by the recognition in clause 2 of the Constitution that LMIM was the trustee of the FMIF for the members of the FMIF.
- (ii) In the alternative, the pleaded terms are to be implied in fact as being clear, obvious (in light of the law of trusts), reasonable and equitable, necessary to give business efficacy to the Constitution, and not inconsistent with any express term of the Constitution.

~~19.27.~~ Further and in the alternative the principles obligations and restrictions on LMIM referred to in sub-paragraphs (a) to (d) of paragraph 26 are were imposed on LMIM and its agents and assignees in Equity.

~~20.28.~~ As at 16 November 2012 when Trilogy became the RE of the WFMIF, the rights of Trilogy as RE of the WFMIF and of its agents and assignees ~~and in that capacity as a Class B unitholder in the FMIF~~ were thereafter qualified and limited by reference to the principles referred to in paragraphs 26 and 27 above, insofar as ~~they~~ those principles had applied to LMIM and its agents and assignees immediately before ~~it~~ LMIM ceased to be the RE of the WFMIF.

#### Unit holdings

~~21.29.~~ At all material times, there were three different classes of issued Units in the FMIF, as follows:

- (a) Class A units, which were held by ordinary unitholders of the FMIF;

- (b) Class B units, all of which were held for the Feeder Funds by LMIM, apart from those transferred to Trilogy on 16 November 2012 as RE for the WFMIF as pleaded in paragraph 6 above, and all of which were Australian dollar investments;
- (c) Class C units, which were held by unitholders of the FMIF who had invested in foreign currencies.

22.30. At all material times, Class A and Class B units in the FMIF had the same paid up value, and the same rights and obligations.

23. LMIM held Class B units in the FMIF on behalf of one of the CPAIF, the ICPAIF or, before it was replaced by Trilogy as RE of the WFMIF, the WFMIF.

24. On and after 16 November 2012, Trilogy held all of its Class B units in the FMIF on behalf of the WFMIF.

#### CPAIF Units

31. At all material times the Class B units in the FMIF held for the CPAIF ("CPAIF Units") were scheme property of the CPAIF, held by LMIM as the responsible entity for the CPAIF.

#### Particulars

- (a) On about 20 October 2004, PTAL applied for the issue to it of units in the FMIF as custodian for the CPAIF, i.e. as agent for LMIM as responsible entity for the CPAIF, not as a trustee of any trust as between PTAL and LMIM as responsible entity for the CPAIF.
- (b) From about April 2008 until about November 2011, the CPAIF Units were held in the register of members of the FMIF maintained by LMIM under Chapter 2C of the Act ("FMIF Unit Register") in the name "LMIM atf, [as trustee for] LM Currency Protected Aust Income Fund".
- (c) From then until 28 May 2018 the CPAIF Units were held in the FMIF Unit Register:
  - (i) initially in the name "The Trust Company (PTAL) Limited ATF [As Trustee For] LM Currency Protected Aust Income Fund", the use of the acronym "ATF" instead of "ACF" (meaning As Custodian For) being a mistake in the FMIF Unit Register;
  - (ii) subsequently in the name "The Trust Company (PTAL) Limited ACF [As Custodian For] LM Currency Protected Australian Income Fund".
- (d) On about 25 May 2018, Mr Whyte was first notified by PTAL that it had been removed as custodian of the property of the CPAIF with effect from 31 March 2016, and on 28 May 2018 LMIM and PTAL requested that the FMIF Unit Register be changed.

- (e) From 28 May 2018, the CPAIF Units have been held in the FMIF Unit Register in the name "LM Investment Management Limited (In Liquidation) as RE for LM Currency Protected Australian Income Fund".

32. In the alternative, the CPAIF Units:

- (a) were held by LMIM as responsible entity for the CPAIF at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for LMIM as responsible entity for the CPAIF on the terms of the Custody Agreement, at all subsequent material times until 28 May 2018;
- (c) are now held by LMIM as responsible entity for the CPAIF.

33. In the premises and further to paragraphs 31 and 32 above (including in the alternative):

- (a) at all material times LMIM as the responsible entity for the CPAIF was a beneficiary of the FMIF;
- (b) at all material times LMIM as the responsible entity for the CPAIF held a beneficial interest in the property of the FMIF;
- (c) LMIM's rights in relation to the CPAIF Units are qualified by each of the principles referred to in paragraphs 26 and 27 above.

WFMIF Units

34. At all material times the Class B units in the FMIF held for the WFMIF ("WFMIF Units") were scheme property of the WFMIF, held by the responsible entity for the WFMIF from time to time.

Particulars

- (a) From about April 2008 until about November 2011, the WFMIF Units were held in FMIF Unit Register in the name "LMIM atf [as trustee for] LM Wholesale Mortgage Income Fund".
- (b) from then until 7 March 2013, the WFMIF Units were held in the FMIF Unit Register:
- (i) initially in the name "The Trust Company (PTAL) Limited ATF [As Trustee For] LM Wholesale Mortgage Income Fund", the use of the acronym "ATF" instead of "ACF" (meaning As Custodian For) being a mistake in the FMIF Unit Register;
- (ii) subsequently in the name "The Trust Company Limited ATF [As Trustee For] LM Wholesale Mortgage Income Fund", the use of the acronym "ATF" again being a mistake in the FMIF Unit Register;

- (c) from 7 March 2013 to the date of this pleading, the WFMIF Units have been held in the name "The Trust Company Limited As Custodian For LM Wholesale First Mortgage Income Fund".
- (d) The FMIF Unit Register presently records the WFMIF Units as being held by the business with ABN 59 080 383 679, being that ABN issued to the entity described as "TRILOGY FUNDS MANAGEMENT LIMITED".

35. In the alternative, the WFMIF Units:

- (a) were held by LMIM as responsible entity for the WFMIF at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for the responsible entity for the WFMIF from time to time on the terms of the Custody Agreement, at all material times until at least 16 November 2012;
- (c) were then held by TCL on trust for Trilogy as responsible entity for the WFMIF on the terms of the Trilogy Custody Deed, at all material times from a date on or after 16 November 2012 and on or before 7 March 2013;
- (d) are now held by TCL on trust for Trilogy as responsible entity for the WFMIF on the terms of the Trilogy Custody Deed.

36. In the premises and further to paragraphs 34 and 35 above (including in the alternative):

- (a) at all material times the responsible entity for the WFMIF from time to time was a beneficiary of the FMIF;
- (b) at all material times the responsible entity for the WFMIF from time to time held a beneficial interest in the property of the FMIF;
- (c) Trilogy and TCL's rights in relation to the WFMIF Units are qualified by each of the principles referred to in paragraphs 26 to 28 above.

#### The ICPAIF Units

37. At all material times the Class B units in the FMIF held for the ICPAIF ("ICPAIF Units") were scheme property of the ICPAIF, held by LMIM as the responsible entity for the ICPAIF.

#### Particulars

- (a) On about 28 November 2006, PTAL applied for the issue to it of units in the FMIF as custodian for the ICPAIF, i.e. as agent for LMIM as responsible entity for the ICPAIF, not as a trustee of any trust as between PTAL and LMIM as responsible entity for the ICPAIF.
- (b) From about April 2008 until about November 2011, the ICPAIF Units were held in the FMIF Unit Register in the name "LMIM acf [as custodian for] LM

Institutional CPAIF” , the use of the acronym ‘acf’ instead of ‘atf’ (meaning as trustee for) being a mistake in the FMIF Unit Register for that period.

- (c) From then until 28 May 2018, the CPAIF Units were held in the FMIF Unit Register in the name “The Trust Company (PTAL) Limited acf [as custodian for] LM Institutional CPAIF”.
- (d) On about 25 May 2018, Mr Whyte was first notified by PTAL that it had been removed as custodian of the property of the ICPAIF with effect from 31 March 2016, and on 28 May 2018 LMIM and PTAL requested that the FMIF Unit Register be changed.
- (e) From 28 May 2018, the ICPAIF Units have been held in the FMIF Unit Register in the name “LM Investment Management Limited (In Liquidation) as RE for LM Institutional Currency Protected Australian Income Fund”.
- (f) The FMIF Unit Register has at all material times and continues to record the ICPAIF Units as being held by the business with ABN 92 510 262 319, being that ABN issued to the entity described as “The trustee for LM INSTITUTIONAL CURRENCY PROTECTED AUSTRALIAN INCOME FUND”.

38. In the alternative, the ICPAIF Units:

- (a) were held by LMIM as responsible entity for the ICPAIF, at all material times until about November 2011;
- (b) were then assigned to PTAL to hold on trust for LMIM as responsible entity for the ICPAIF on the terms of the Custody Agreement, at all subsequent material times until 28 May 2018;
- (c) are now held by LMIM as responsible entity for the ICPAIF.

39. In the premises and further to paragraphs 37 and 38 above (including in the alternative):

- (a) at all material times LMIM as the responsible entity for the ICPAIF was a beneficiary of the FMIF;
- (b) at all material times LMIM as the responsible entity for the ICPAIF held a beneficial interest in the property of the FMIF;
- (c) LMIM’s rights in relation to the ICPAIF Units are qualified by each of the principles referred to in paragraphs 26 and 27 above.

## **Redemptions**

25-40. Pursuant to s.601KA of the Act, the Constitution of the FMIF was entitled to make provision for members to withdraw from the FMIF:

- (a) while the FMIF is liquid, as defined in s.601GA(4) of the Act; or
- (b) while the FMIF is not liquid, but only in accordance with the provisions of Part 5C.6 of the Act.

26.41. Pursuant to s.601KA(3) of the Act, the RE was not permitted to allow a member to withdraw from the FMIF:

- (a) if the FMIF is liquid – otherwise than in accordance with the Constitution; or
- (b) if the FMIF is not liquid – otherwise than in accordance with the Constitution and ss.601KB to 601KE of the Act.

27.42. Pursuant to s.601KA(4) of the Act, the FMIF was liquid if liquid assets account for at least 80% of the value of the property of the FMIF.

**Particulars.**

- (a) Pursuant to s.601KA(5) of the Act, the following were liquid assets unless it is proved that LMIM as RE of the FMIF cannot reasonably expect to realise them within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid:
  - (i) money in an account or on deposit with a bank;
  - (ii) bank accepted bills;
  - (iii) marketable securities (as defined in section 9);
  - (iv) property of a prescribed kind.
- (b) Pursuant to s.601KA(6) of the Act, any other property was a liquid asset if LMIM as RE of the FMIF reasonably expected that the property can be realised for its market value within the period specified in the Constitution for satisfying withdrawal requests while the FMIF is liquid.

28.43. The Constitution made no provision for members to withdraw from the FMIF while the FMIF was not liquid in accordance with the provisions of Part 5C.6 of the Act.

29.44. The Constitution made provision for members to withdraw from the FMIF while the FMIF was liquid in terms to the following effect:

- (a) by clause 7.1, while the Scheme was liquid as defined in s.601KA(4) of the Act, any Member may request that some or all of their Units be redeemed by giving the RE a Withdrawal Notice by the start of or within the relevant Withdrawal Notice Period (as required by the relevant definition of Withdrawal Notice);
- (b) by clause 7.2(a), the RE must, subject to clause 7.2(b), redeem Units the subject of a request made by any Member under clause 7.1 out of the Scheme Property for the Withdrawal Price (being the Net Fund Value divided by the total number of Units issued) within 365 days or 180 days (as provided therein), or within a shorter period in its absolute discretion (the “**Withdrawal Offer**”);

- (c) by clause 7.2(b), the RE may suspend the Withdrawal Offer as detailed in clause 7.2(a) for such periods as it determines where:
  - (i) the Scheme's cash reserves fall and remain below five per cent for ten consecutive days; or
  - (ii) if in any period of 90 days, the RE receives valid net Withdrawal Notices equal to 10 per cent or more of the Scheme's issued Units and, during the period of 10 consecutive days falling within the 90 day period, the Scheme's cash reserves are less than ten per cent of the total assets; or
  - (iii) it is not satisfied that sufficient cash reserves are available to pay the Withdrawal Price on the appropriate date and to pay all actual and contingent liabilities of the Scheme; or
  - (iv) any other event or circumstance arises which the RE considers in its absolute discretion may be detrimental to the interests of the Members of the Scheme;
- (d) by clause 7.3(b), a Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

~~30.45.~~ At all material times from 14 April 2009, LMIM as RE of the FMIF was the recipient of relief from ASIC under s.601QA(1) of the Act ("**ASIC Relief**") by which it was:

- (a) exempted from s.601FC(1)(d) of the Act in relation to allowing a member of the FMIF to withdraw in accordance with s.601KEA of the Act as inserted by the ASIC Relief;
- (b) conferred (by s.601KEA thereby inserted) with the power to allow a member to withdraw from the FMIF in accordance with the Constitution if that member was experiencing circumstances of hardship as defined by the ASIC Relief, which included the power to allow LMIM to withdraw in accordance with the Constitution insofar as a member of one of the Feeder Funds was experiencing circumstances of hardship as so defined, subject to the limits defined by the ASIC Relief;
- (c) exempted (by s.601KA(3AA) thereby inserted) from s.601KA(3) of the Act to the extent of the power thereby conferred.

#### **Particulars**

The ASIC Relief was granted by the following instruments:

- (i) ASIC Instrument 09-00278 dated 14 April 2009; and
- (ii) ASIC Instrument 09-00963 dated 11 November 2009.

~~31.46.~~ From time to time after 14 April 2009, LMIM as RE of the FMIF permitted certain redemptions in accordance with the ASIC Relief (hereinafter referred to as "**Genuine Hardship Redemptions**").

~~32.47.~~ On or about 11 May 2009, LMIM as RE of the FMIF suspended the Withdrawal Offer under clause 7.2(b) of the Constitution, purportedly with the exception of:

- (a) those approved under the ASIC Relief; and
- (b) those requested by ~~itself as a Class B unitholders~~ for distributions to investors in the Feeder Funds or for the expenses of the Feeder Funds, as the cash flow of the FMIF allowed.

#### Particulars

- (i) LMIM stated in its Second Supplementary Product Disclosure Statement dated 3 March 2009 that "... payment of investor withdrawals is likely to take 365 days. The Manager may also suspend withdrawals for such periods as it determines".
- (ii) LMIM stated in its Third Supplementary Product Disclosure Statement dated 30 October 2009 that "In order to protect all investments, the Manager has, as it determines, suspended withdrawals, with the exception of those approved under hardship provisions and feeder fund payments for investor distributions and fund expenses, as the cash flow allows".

~~33.48.~~ In the premises, the exception to the suspension of the Withdrawal Offer referred to in paragraph ~~47(b)~~~~32(b)~~ above was not authorised by the Constitution, the Act or the ASIC Relief.

~~34.49.~~ At no time after 11 May 2009, did LMIM as RE of the FMIF:

- (a) lift the suspension referred to in paragraph ~~47~~~~32~~ above; or
- (b) re-instate the Withdrawal Offer.

~~35.50.~~ Despite the suspension of the Withdrawal Offer, between 11 May 2009 and 31 January 2013:

- (a) LMIM made or caused to be made requests to redeem CPAIF Units, WFMIF Units and ICPAIF Units~~as a Class B unitholder made requests to redeem Class B units~~, which were not Genuine Hardship Redemptions;
- (b) LMIM as RE of the FMIF granted such requests, and in satisfaction of each thereof:
  - (i) caused to be paid amounts from the assets of the FMIF at the direction of LMIM as responsible entity for the Feeder Fund for which the unit the subject of the request was held; or



- (ii) recognised or reconciled a prior payment of an amount or prior payments of amounts from the assets of the FMIF which it had previously caused to be paid for the benefit of that a Feeder Fund at the direction of LMIM as its responsible entity;

**Particulars of (i) and (ii)**

- (1) the amounts paid, ~~or~~ recognised or reconciled by LMIM in respect of the redemptions of the Class B units equalled the value of the units the subject of that request, calculated as the Net Fund Value divided by the total number of units issued in the FMIF at that time, multiplied by the number of units the subject of the request;
- ~~(2)~~ the amounts were paid to various entities at the direction of LMIM as a Class B unit holder;
- ~~(3)~~(2) LMIM as RE of the FMIF satisfied requests in respect of 45,240,212.36 units held for by LMIM as RE of the CPAIF for an aggregate value of \$42,510,704.06, of which all but \$24,830.41 was satisfied before 16 November 2012;
- ~~(4)~~(3) LMIM as RE of the FMIF satisfied requests in respect of 11,271,272.09 units held for by LMIM as RE of the WFMIF for an aggregate value of \$9,796,090.76, the latest of which was satisfied on 15 November 2012;
- ~~(5)~~(4) LMIM as RE of the FMIF satisfied requests in respect of 5,335,882.97 units held for by LMIM as RE of the ICPAIF for an aggregate value of \$5,069,118.30, the latest of which was satisfied on 13 November 2012;
- ~~(6)~~(5) The amounts referred to in sub-paragraphs (2) to ~~(4)~~(5) hereof include amounts which were reported by LMIM to ASIC as Genuine Hardship Redemptions in respect of the CPAIF of \$1,927,595, in respect of the WFMIF of \$364,000 and in respect of the ICPAIF of \$25,000;
- ~~(7)~~(6) The amount referred to in sub-paragraphs ~~(2)~~(3) hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the CPAIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the CPAIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of approximately \$12,191,153.59 across the financial years ended 30 June 2010 and 30 June 2011;
- ~~(8)~~(7) The amount referred to in sub-paragraphs (3)(4) hereof includes amounts which had previously been paid by LMIM as trustee of the

MPF at its direction as RE of the WFMIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the WFMIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of \$67,295.91 across the financial year ended 30 June 2011;

~~(9)(8)~~ The amount referred to in sub-paragraphs ~~(4)(5)~~ hereof includes amounts which had previously been paid by LMIM as trustee of the MPF at its direction as RE of the ICPAIF, which had been accounted for as being in satisfaction of liabilities owed by the MPF to the FMIF and as creating a receivable owed by the ICPAIF to the FMIF, and which were then recognised or reconciled by and were recognised as being in satisfaction of redemption withdrawals requests in an aggregate amount of \$677,439.07 across the financial year ended 30 June 2011.

- (c) in relation to each request, LMIM as RE of the the Feeder Funds for which the unit the subject of the request was held and a holder of Class B units accepted the payment, or recognition or reconciliation tendered as pleaded in sub-paragraph (b) above.
- (d) LMIM then purported to cancel CPAIF Units, WFMIF Units and ICPAIF Units, Class B units to the extent of each such request.

#### **Breach in relation to Redemptions**

36.51. As at 11 May 2009 and thereafter until it was wound up, around 94% or more of the value of the property of the FMIF comprised its loans and receivables.

#### **Particulars**

- (a) The audited accounts for the year ending 30 June 2008, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
- (b) The audited accounts for the year ending 30 June 2009, record that at least around 96% of the value of the property of the FMIF comprised its loans and receivables.
- (c) The audited accounts for the year ending 30 June 2010, record that at least around 98% of the value of the property of the FMIF comprised its loans and receivables.
- (d) The audited accounts for the year ending 30 June 2011, record that at least around 94% of the value of the property of the FMIF comprised its loans and receivables.
- (e) The audited accounts for the year ending 30 June 2012, record that at least around 97% of the value of the property of the FMIF comprised its loans and receivables.

37.52. As at 11 May 2009 and at all material times thereafter, LMIM as RE of the FMIF did not have any reasonable basis on which to expect that the loans and receivables of the FMIF could be realised for their market value within 365 days.

38.53. In the premises of paragraphs 5136 and 5237 above, on and from at least 11 May 2009 the FMIF was not liquid within the meaning of s.601KA(4) of the Act.

39.54. In the premises, by approving the withdrawal requests and making or causing to be made the payments referred to in paragraph 5035 above while the FMIF was not liquid and while the Withdrawal Offer was suspended, LMIM:

- (a) acted outside the scope of any power conferred on it by the Constitution or the Act, or otherwise by law;
- (b) made payments out of the property of the FMIF which were not authorised by the Constitution or the Act, in that:
  - (i) it approved withdrawal requests from itself of Class B units which were not Genuine Hardship Redemptions, while the FMIF was not liquid;
  - (ii) in the alternative, if the FMIF was liquid at the time any such request was approved, it approved that request without authority to do so under the Constitution;
- (c) gave priority to its own interests as a holder of Class B units in the FMIF over the interests of the members of the FMIF as a whole;
- (d) preferred the interests of the members of the Feeder Funds over the interests of the members of the FMIF;
- (e) failed to treat members who hold interests of different classes, namely Class A and Class B units, fairly; and
- (f) failed to act in the best interests of the members of the FMIF as a whole.

40.55. In the premises, LMIM as RE of the FMIF breached the terms of its trust, and the obligations set out in paragraphs 2315 and 4126 above.

41.56. In the premises, the FMIF suffered loss or damage by reason of LMIM's breaches and contraventions referred to in paragraph 5540 above.

#### **Particulars**

The FMIF suffered loss or damage in the following amounts:

- (a) \$40,583,109.06 referable to redemptions of Class B units held as RE of the CPAIF, plus interest;
- (b) \$9,432,090.76 referable to redemptions of Class B units held as RE of the WFMIF, plus interest;
- (c) \$5,044,118.30 referable to redemptions of Class B units held as RE of the ICPAIF, plus interest.

~~42.57.~~ In the premises, LMIM is liable to compensate the FMIF to the extent of the loss or damage referred to in paragraph ~~5641~~ above.

#### Particulars

- (a) LMIM is liable as pleaded both in equity, and pursuant to section 1317H of the Act.

~~43.58.~~ In the premises, LMIM's rights in relation to the CPAIF Units as a Class B unitholder in the FMIF are subject to the principles referred to in paragraphs ~~2618(a) to (d)~~ and 27 above to the extent of its LMIM's liabilities referred to in paragraphs ~~5641~~ and ~~5742~~ above, alternatively so far as they concern the CPAIF ~~and the ICPAIF~~.

~~44.59.~~ In the premises, as at and from 16 November 2012 when Trilogy became the RE of the WFMIF, Trilogy's and, further and in the alternative, TCL's rights in relation to the WFMIF Units as a Class B unitholder in the FMIF were and remain are subject to the principles referred to in paragraphs 2618 to ~~2820~~ above to the extent of the liabilities referred to in paragraphs ~~5641~~ and ~~5742~~ above (except for the \$24,830.41 referred to in paragraph 50(b)(ii)(2) above), alternatively so far as they concern the WFMIF.

60. In the premises, LMIM's rights in relation to the ICAPIF Units are subject to the principles referred to in paragraphs 26 and 27 above to the extent of LMIM's liabilities referred to in paragraphs 56 and 57 above, alternatively so far as they concern the ICPAIF.

~~45.61.~~ In the premises, each cancellation of Class B units referred to in paragraph ~~50(d)~~~~35(d)~~ of this Statement of Claim is void *ab initio* and of no effect, or alternatively voidable.

#### Indemnity against the assets of the Feeder Funds

~~46.62.~~ The Constitution of each Feeder Fund conferred on LMIM as RE thereof a right to be indemnified from the assets of that fund on a full indemnity basis, in respect of a matter unless, in respect of that matter, it had acted negligently, fraudulently or in breach of trust, in that capacity.

#### Particulars

- (a) Clause 18.3 of the Constitution of the CPAIF, clause 19.1(c) of the Constitution of the WFMIF, and clause 18.3 of the Constitution of the ICPAIF.

~~47.63.~~ In acting as pleaded in paragraph ~~5035~~ above, and in respect of each request for withdrawal of Class B units from the FMIF, LMIM:

- (a) was acting both as the RE of the FMIF and as the RE of a Feeder Fund;  
(b) ~~conferred a financial benefit on the Feeder Fund in question;~~  
(c) ~~(b)~~ acted in the proper performance of its duties to the Feeder Fund in question;

~~(d)~~(c) became entitled to an indemnity out of the assets of the Feeder Fund in question in respect of its liability for the loss to the FMIF pleaded in paragraphs 5641 and 5742 above, insofar as that loss relates to each such request; and

~~(e)~~(d) became entitled to a lien or charge over the assets of the Feeder Fund in question to secure and to the extent of that indemnity.

~~48. Further and in relation to the loss and damage pleaded in paragraphs 41 and 42 above, LMIM as RE of the FMIF is entitled to exercise or be subrogated to LMIM's right to the indemnity referred to in paragraph 47(d) above, or to enforce the lien or charge referred to in paragraph 47(e) above.~~

~~49.64. In the premises and further to paragraphs 5843 and 44 above, LMIM's rights in relation to the CPAIF Units as a Class B unitholder in the FMIF are subject to the principles referred to in paragraphs 2618(a) and (c) and thereby in paragraph 27 above to the extent of its LMIM's rights as RE of the FMIF as set out in paragraphs 63(c) and 63(d) 48 above, alternatively so far as they concern the CPAIF and the ICPAIF.~~

~~50.65. In the premises and further to paragraph 59 above, as at and from 16 November 2012 when Trilogy became the RE of the WFMIF, Trilogy's and, further and in the alternative, TCL's rights in relation to the WFMIF Units as a Class B unitholder in the FMIF were and remain are subject to the principles referred to in paragraphs 2618(a) and (c) and thereby in paragraphs 27 to and 2820 above to the extent of the liabilities referred to in paragraphs 5641 and 5742 above so far as they concern the WFMIF.~~

~~66. In the premises and further to paragraph 60 above, LMIM's rights in relation to the ICPAIF Units are subject to the principles referred to in paragraphs 26(a) and (c) and thereby in paragraph 27 above to the extent of LMIM's rights as set out in paragraphs 63(c) and 63(d) above so far as they concern the ICPAIF.~~

### **Income Distributions**

~~51.67. The Constitution made provision for making income distributions to members of the FMIF, to the following effect:~~

- (a) by clause 11.1, the Income of the Scheme for each Financial Year will be determined in accordance with the applicable Accounting Standards;
- (b) by clause 11.2, for each Financial Year:
  - (i) (sub-paragraph a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and
  - (ii) (sub-paragraph b) provisions or other transfers to or from reserves may be made in relation to such items as the RE considers appropriate in accordance with applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

- (c) by clause 11.3, the Distributable Income of the Scheme for a month, a Financial Year or any other period will be such amount as the RE determines. Distributable Income is paid to Members after taking into account any Adviser fees or costs associated with individual Members' investments, to the extent those fees or costs have not otherwise been taken into account;
- (d) upon the true construction of clauses 11.1, 11.2 and 11.3, the Distributable Income could be no greater than the Fund's income less its expenses determined in accordance with the Australian Accounting Standards;
- (e) by clause 12.1, the Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute discretion;
- (f) by clause 12.2, the RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period;
- (g) by clause 12.3, unless otherwise agreed by the RE and subject to the rights, restrictions and obligations attaching to any particular Unit or Class, the Members on the Register will be presently entitled to the Distributable Income of the Scheme on the last day of each Distribution Period;
- (h) by clause 12.4, the RE may distribute the capital of the Scheme to the Members. Subject to the rights, obligations and restrictions attaching to any particular Unit or Class, a Member is entitled to that proportion of the capital to be distributed as is equal to the number of Units held by that Member on a date determined by the RE divided by the number of Units on the Register on that date. A distribution may be in cash or by way of bonus Units;
- (i) by clause 12.6:
  - (i) (sub-paragraph a) the RE may invite Members to reinvest any or all of their distributable income entitlement by way of application for additional Units in the Scheme;
  - (ii) (sub-paragraph b) The terms of any such offer of reinvestment will be determined by the RE in its discretion and may be withdrawn or varied by the RE at any time;
  - (iii) (sub-paragraph c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer;
  - (iv) (sub-paragraph d) The Units issued as a result of an offer to reinvest will be deemed to have been issued on the first day of the next Distribution Period immediately following the Distribution Period in respect of which the distributable income being reinvested was payable;
- (j) by clause 3.2, the RE may distribute the Distributable Income for any period between different Classes on a basis other than proportionately, provided that the RE treats the different Classes fairly.

~~52.68.~~ Upon the true construction of the clauses 11.3 and 12.2 of the Constitution, the power to distribute income of the FMIF was conditional on LMIM making a determination of the Distributable Income for the relevant Distribution Period.

~~53.69.~~ Upon the true construction of the power conferred by clause 11.3 of the Constitution, the RE in exercising its power to determine the Distributable Income of the FMIF for a Distribution Period was:

- (a) required to act in good faith and for a proper purpose;
- (b) required to consider and take into account:
  - (i) the income of the FMIF, determined in accordance with applicable Accounting Standards, pursuant to clause 11.1 of the Constitution; and
  - (ii) the expenses of the FMIF, determined in accordance with applicable Accounting Standards, pursuant to clause 11.2 of the Constitution; and
- (c) not empowered to determine that there was any Distributable Income for a Distribution Period where the said expenses exceeded the said income for that Distribution Period.

~~54.70.~~ LMIM as RE of the FMIF: ~~Between 31 July 2011 and 1 November 2012:~~

- (a) ~~LMIM as RE of the FMIF from time to time recognised further income distributions to the Class B unitholders for the CPAIF Units, the WFMIF Units and the ICPAIF Units on the last calendar day of each Distribution Period from 1 July 2011 to 31 October 2012;~~

#### Particulars

These distributions were recorded in the ledgers maintained by LMIM as RE of the FMIF ~~in respect of~~ in relation to the each of the Feeder Funds, as follows:

- (i) ~~it was recorded that PTAL as trustee for the CPAIF received income distributions were recorded as having been made in relation to the CPAIF Units for each pleaded Distribution Period, and in the aggregate amount of \$12,231,875.90;~~
  - (ii) ~~it was recorded that PTAL as trustee for the WFMIF received income distributions were recorded as having been made in relation to the WFMIF Units for each pleaded Distribution Period, and in the aggregate amount of \$6,219,464.37, the latest of which was recorded as at 31 October 2012; and~~
  - (iii) ~~it was recorded that PTAL as trustee for the ICPAIF received income distributions were recorded as having been made in relation to the ICPAIF Units for each pleaded Distribution Period, and in the aggregate amount of \$1,131,173.50;~~
- (b) LMIM as RE of the FMIF recognised a re-investment of each of the income distributions referred to in sub-paragraph (a) in further units in the FMIF on the first day of the next Distribution Period in the ledger which it maintained in

~~respect of~~in relation to the relevant Feeder Fund, and in the FMIF Unit Registerregister of the members of the FMIF;

#### Particulars

- (i) ~~LMIM as RE of~~The CPAIF increased its investment in the FMIF by an aggregate of 16,036,932.56 units therein.
  - (ii) ~~LMIM as RE (as it then was) of~~The WFMIF increased its investment in the FMIF by aggregate of 8,190,010.02 units therein, the latest of which were issued on 1 November 2012.
  - (iii) ~~LMIM as RE of~~The ICPAIF increased its investment in the FMIF by aggregate of 1,484,259.16 units therein.
- (c) LMIM as RE of the FMIF did not recognise any further distributable income payable to Class A unitholders.

#### Breach in relation to Distributions

~~55.71.~~ From and including the financial year ended 30 June 2009 a significant number of the loans made on behalf of the FMIF were in default for non-payment or were otherwise impaired.

~~56.72.~~ As a consequence including of the matters pleaded in paragraph ~~7155~~, at all material times between 1 January 2011 and 1 November 2012 the expenses of the FMIF exceeded the income of the FMIF, determined in accordance with the applicable accounting standards.

#### Particulars

- (a) The financial statements of the FMIF for the year ended 30 June 2011 recorded a net loss before distributions to unitholders of \$77,418,896.
- (b) The financial statements of the FMIF for the year ended 30 June 2012 recorded a net loss before distributions to unitholders of \$88,615,577.
- (c) The unaudited draft management accounts of the Fund for the half year ended 31 December 2012 recorded a net loss before distributions to unitholders of \$19,117,976.

~~57.73.~~ Further:

- (a) LMIM suspended income distributions from the FMIF as from 1 January 2011;



- (b) by doing so, LMIM made a determination or determinations that the FMIF had no Distributable Income for the period 1 January 2011 to December 2011.

**Particulars to sub-paragraphs (a) and (b)**

This may be inferred from following facts:

- (i) the notes to the financial statements of the FMIF for the year ended 30 June 2012 which state that "Distributions have been suspended from 1 January 2011".
- (ii) The directors of LMIM stated in an update to investors dated 24 August 2011 that "The Fund will not be declaring or paying interest distributions for the period 1 January 2011 until 31 December 2011, at which time the distribution strategy will be reviewed dependent on performance of the Fund's assets."
- (iii) The directors of LMIM, in a letter to investors dated 14 September 2011, stated that "The Fund is declaring zero income from January 2011 to December 2011, in order to focus on unit price."

~~58.74.~~ Between 1 January 2011 and 1 November 2012, LMIM did not make any determination that the FMIF had any Distributable Income.

~~59.75.~~ In the premises, and as to each Distribution Period between 1 July 2011 and 28 February 2013, LMIM had no power under the Constitution or the Act, or otherwise at law:

- (a) to distribute any income of the FMIF to any unitholder of the FMIF; or
- (b) further and in the alternative, to make any determination that the FMIF had any Distributable Income.

~~60.76.~~ Further, the purpose of LMIM in recognising each of the distributions to and re-investments by Class B (but not Class A) unitholders referred to in paragraphs 70(a) and 70(b)~~54(b)~~ above was to increase the value of units in each of the Feeder Funds so that they remained the same as the value of units in the FMIF.

**Particulars**

This may be inferred from the following facts:

- (a) The statement in the notes to the financial statements of the FMIF for the year ended 30 June 2012 that "These distributions were declared to enable the feeder funds to recognise distribution income to match expenses incurred".
- (b) On 20 August 2012, Mr Grant Fischer, Executive Director and Chief Financial Officer of LMIM agreed in an email to Eryn Vannucci, Financial Controller of LMIM, that "we planning on running a Feeder Fund distribution from FMIF to the Feeder Funds for the period Jan to Jun 2012 to align their unit prices once the impairment figures are finalized like we did at December 11".

~~61.77.~~ The effect of LMIM recognising each of the distributions to and re-investments by Class B (but not Class A) unitholders referred to in paragraphs 70(a) and 70(b)~~54(b)~~ above was to increase the beneficial interest in the FMIF of one class of unitholders over another.

~~62.78.~~ The purpose set out in paragraph 7660 above was not a proper purpose to make a determination to:

- (a) recognise distributions to and re-investments by Class B and not Class A unitholders;
- (b) increase the beneficial interest of one class of unitholders over another.

~~63.79.~~ In the premises, LMIM:

- (a) acted outside the scope of any power conferred on it by the Constitution or the Act, or otherwise by law;
- (b) in the alternative to sub-paragraph (a), exercised the powers conferred by clauses 3.2, 11.3 and 12.6 of the Constitution for an improper or foreign purpose.

~~64.80.~~ Further, in the premises of the matters set out in paragraphs 2921 and 30 to 23 above, the recognition of the distributions to and re-investments in the FMIF for the CPAIF Units, the WFMIF Units and the ICPAIF Units and not for the Class A Units by Class B and not Class A unitholders referred to in paragraph 7054 above for the purpose set out in paragraph 7660 above and having the effect set out in paragraph 7761 above, was not fair to the Class A unitholders.

~~65.81.~~ Further and in the premises of the same matters referred to in paragraph 80 above, In the premises of paragraphs 4, 21 to 23, 55 to 62 and 64 above, by recognising each of the distributions to and re-investments by Class B and not Class A unitholders in the circumstances set out in LMIM as RE of the FMIF:

- (a) gave priority to its own interests as a holder of Class B units in the FMIF (as pleaded in paragraphs 29 to 39 above) over the interests of the members of the FMIF as a whole;
- (b) preferred the interests of the members of the Feeder Funds over the interests of the members of the FMIF;
- (c) failed to treat members who hold interests of different classes, namely Class A and Class B units, fairly.

~~66.82.~~ In the premises, LMIM as RE of the FMIF, in exercising a power to recognise each of the distributions to and re-investments by Class B unitholders referred to in paragraph 7054 above, breached the terms of its trust and the obligations set out in paragraph 2315 above.

~~67.83.~~ In the premises, each issue of further units referred to in paragraph ~~70(b)54(b)~~ above is void and of no effect, or alternatively voidable.

### **The capital distributions**

~~68.84.~~ In around February and March 2013, LMIM as RE of the FMIF declared and paid a distribution of the capital of the FMIF to the ~~M~~members of the FMIF (**First Capital Distribution**).

#### **Particulars**

The following cash amounts were paid to the members of the FMIF:

- (a) on about 26 February 2013, \$2,062,739.66 in relation to the CPAIF Unitsto LMIM as RE of the CPAIF;
- (b) on about 8 March 2013, \$1,700,317.84 in relation to the WFMIF Unitsto Trilogy as RE of the WFMIF;
- (c) on about 26 February 2013, approximately \$159,799.91 in relation to the ICPAIF Unitsto LMIM as RE of the ICPAIF; and
- (d) \$4,466,923.68 to Class A and Class C unit holders.

~~69.85.~~ In around June 2013, LMIM as RE of the FMIF declared a distribution of the capital of the FMIF to the members of the FMIF (**Second Capital Distribution**).

#### **Particulars**

The following cash amounts were paid to the members of the FMIF:

- (a) \$958,156.73 in relation to the CPAIF Unitsto LMIM as RE of the CPAIF;
- (b) \$789,645.73 in relation to the WFMIF Unitsto Trilogy as RE of the WFMIF;
- (c) \$74,228.16 in relation to the ICPAIF Unitsto LMIM as RE of the ICPAIF;
- (d) \$2,079,798.69 to Class A and Class C unit holders.

~~70.86.~~ Further, ~~a~~At the time of the First and Second Capital Distributions, each of LMIM as RE of the ICPAIF, LMIM as RE of the CPAIF and Trilogy as RE of the WFMIF each of the CPAIF Units, the WFMIF Units and the ICPAIF Units:

- (a) were held their units in the FMIF subject to the principles referred to in paragraphs 2618 to 2820 above, to the extent of LMIM's liability to the FMIF for loss and damage, as pleaded in paragraphs 5641 to 6044 above;
- (b) their respective holders were therefore not entitled to be paid either the First or the Second Capital Distribution in cash; and
- (c) LMIM as RE of the FMIF was entitled instead to account for the amounts to be paid in relation to those units in accordance with the principles referred to in paragraphs 26 to 28 above, were instead entitled to recognition of an amount in partial satisfaction of the said liability.

71. ~~In the premises, LMIM's rights as a Class B unitholder in the FMIF are further subject to the principle referred to in paragraph 18(d) above, to the extent of the overpayment or wrong payments referred to in paragraphs 68, 69 and 70 above so far as they concern the ICPAIF and CPAIF.~~

72. ~~In the premises, Trilogy's rights as a Class B unitholder in the FMIF are further subject to the principle referred to in paragraphs 18(a) and (d) above, to the extent of the overpayment or wrong payments referred to in paragraphs 68, 69 and 70 above so far as they concern the WFMIF.~~

~~73-87.~~ Further and in the premises of paragraphs ~~45~~61 and ~~83~~67 above:

- (a) ~~at the time of the First and Second Capital Distributions, respectively, the number of CPAIF Units, WFMIF Units and ICPAIF Units units held by each of LMIM as RE of the ICPAIF, LMIM as RE of the CPAIF and Trilogy as RE of the WFMIF was different to the numbers thereof recorded in the FMIF Unit Registerunit register of the FMIF; at the time of the First and Second Capital Distributions;~~
- (b) ~~accordingly, LMIM as RE of the FMIF's the entitlement of LMIM and Trilogy in such capacities in relation to the First and Second Capital Distributions, referred to in paragraph 86(c)70(e) above, was to different amounts than the amounts in fact paid as pleaded in paragraphs 84 and 85 above to them;~~
- (c) if this Honourable Court declares each cancellation of Class B units referred to in paragraph ~~50(d)35(d)~~ above void, then the said entitlement will be for a greater amount than the amount in fact paid, which amount will depend on whether or not this Court declares each issue of further units referred to in paragraph ~~70(b)54(b)~~ above to be void;
- (d) alternatively, if this Honourable Court does not declare each cancellation of Class B units referred to in paragraph ~~50(d)35(d)~~ above void, but declares that each issue of further units referred to in paragraph ~~70(b)54(b)~~ above to be void, then the said entitlement will be for a lesser amount than the amount in fact paid.

#### Particulars

- (i) Further particulars will be provided.

The plaintiff claims the following relief:

1. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the ~~to LMIM as a Class B~~ unitholder in the LM First Mortgage Income Fund ARSN 089 343 288 (formerly the LM Mortgage Income Fund) (FMIF) held for the LM Currency Protected Australian Income Fund ARSN 110 247 875 ("CPAIF", "CPAIF Units") and for the LM Institutional Currency Protected Australian Income Fund ARSN 122 052 868 ("ICPAIF", "ICPAIF Units"):
  - (a) the sum of \$55,059,318.12 plus interest, being the aggregate amount of the loss and damage referred to in paragraph ~~564~~ of the Statement of Claim; and
  - (b) as adjusted for the difference between the sum paid in the First and Second Capital Distributions (as defined in paragraphs ~~846~~ and ~~856~~ of the Statement of Claim), and the amount which ~~LMIM as RE of the CPAIF and ICPAIF would otherwise have been entitled as referred to in paragraph 877~~ of the Statement of Claim.
2. A declaration that the Plaintiff is entitled to withhold from distributions or payments otherwise payable in relation to the Class B units in the FMIF held for the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("WFMIF", "WFMIF Units"): ~~to the Second Defendant as a Class B unitholder in the FMIF:~~
  - (a) the sum of \$55,034,487.71, being the aggregate amount of the loss and damage set out in paragraph ~~564~~ of the Statement of Claim accruing before 16 November 2012, plus interest; and
  - (b) as adjusted for the difference between the sum paid in the First and Second Capital Distributions, and the amount which ~~the Second Defendant would otherwise have been entitled as referred to in paragraph 877~~ of the Statement of Claim.
3. In the alternative to paragraphs 1 and 2, declarations that the Plaintiff:
  - (a) is entitled to withhold from distributions or payments otherwise payable in relation to the CPAIF Units: ~~to the First Defendant as a Class B unitholder in FMIF:~~
    - (i) the sum of \$40,583,109.06, plus interest;
    - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the CPAIF Units, and the amount which ~~the First Defendant would otherwise have been entitled as referred to in paragraph 877~~ of the Statement of Claim in relation thereto;

- (b) is entitled to withhold from distributions or payments in relation to the WFMIF Units otherwise payable to the Second Defendant as a Class B unit holder in the FMIF:
  - (i) the sum of \$9,432,090.76, plus interest;
  - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the WFMIF Units, and the amount which the Second Defendant would otherwise have been entitled as referred to in paragraph 8773 of the Statement of Claim in relation thereto; and
- (c) is entitled to withhold from distributions or payments otherwise payable to in relation to the ICPAIF Units the Third Defendant as a Class B unit holder in the FMIF:
  - (i) the sum of \$5,044,118.30, plus interest;
  - (ii) as adjusted for the difference between the sum paid in the First and Second Capital Distributions in relation to the ICPAIF Units, and the amount which the Third Defendant would otherwise have been entitled as referred to in paragraph 8773 of the Statement of Claim in relation thereto.

4. Further and in the alternative, declarations that:

- (a) LMIM is liable to the FMIF for loss and damage in the amount of \$55,059,318.12 plus interest, being the aggregate amount of the loss and damage referred to in paragraph 5641 of the Statement of Claim; and
- (b) ~~the Plaintiff~~ LMIM is entitled to exercise its or be subrogated to LMIM's rights to an indemnity from the assets of the respective Feeder Funds in satisfaction of that liability, in the following proportions:
  - (i) from the assets of the CPAIF, \$40,583,109.06 plus interest;
  - (ii) from the assets of the WFMIF, \$9,432,090.76 plus interest; and
  - (iii) from the assets of the ICPAIF, \$5,044,118.30 plus interest.

- 5. A declaration that each cancellation of Class B units referred to in paragraph 50(d)~~35(d)~~ of this Statement of Claim is void ab initio and of no effect, or alternatively voidable.
- 6. A declaration that the purported issue of each additional unit in the FMIF referred to in paragraph 70(b)~~54(b)~~ of the Statement of Claim is void and of no effect, or alternatively voidable.
- 7. Further to paragraphs 5 and 6, consequential orders under section 175(1) of the Corporations Act 2001 (Cth), or alternatively in the Court's equitable jurisdiction, for the correction or rectification of the register of members of the FMIF, as now maintained by Mr David Whyte pursuant to order 13(c) of the orders of this Honourable Court made on 17 December 2015.

~~7.8.~~ In the alternative to paragraph 6, a declaration that the additional units in the FMIF referred to in paragraph 70(b)54(b) of the Statement of Claim are held on constructive trust for LMIM as RE of the FMIF.

~~8.9.~~ Interest.

~~9.10.~~ Costs.

~~10.11.~~ Such further or other order as this Honourable Court sees fit.

Signed:

*Gadens.*

Description: Solicitor for the plaintiff

The further amendments to this pleading were settled by Mr Ananian-Cooper of Counsel in consultation with Mr McKenna of Queen's Counsel.

#### **NOTICE AS TO DEFENCE**

Your defence must be attached to your notice of intention to defend.

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: 13534/16

Plaintiff:

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

AND

First Defendant:

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

AND

Second Defendant:

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

AND

Third Defendant:

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

AND

Fourth Defendant:

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

AND

Fifth Defendant:

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

**ORDER**

Before:

Justice Jackson

Date:

13 June 2018

Initiating document:

Amended Application filed 18 May 2018 and Commercial List  
Application filed by email dated 24 April 2018

**ORDER**

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

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

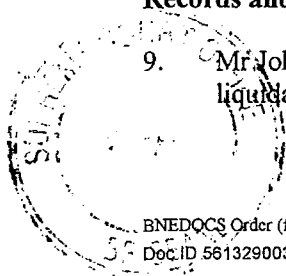


THE ORDER OF THE COURT IS THAT:

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

**Records and documents relating to the CPAIF and the ICPAIF**

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



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

- a. a complete and up to date copy of the registers of members maintained for the CPAIF, including all contact and other details for every current member recorded therein;
- b. a complete and up to date copy of the registers of members maintained for the ICPAIF, including all contact and other details for every current member recorded therein,

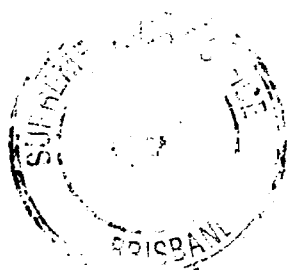
and the Plaintiff will pay Mr Park's reasonable costs of providing the documents and records referred to above.

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

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

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

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



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

#### **Notification of the members of the CPAIF and the ICPAIF**

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

#### **Mediation**

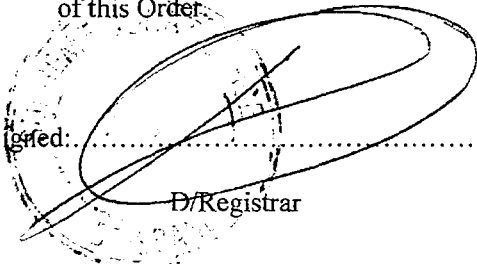
- 16. The parties, except for the fourth and fifth defendants, are directed to attend, participate in, and act reasonably and genuinely in, a mediation on a date to be agreed by the participating parties and the mediator, to be completed by 28 September 2018.
- 17. The mediator is to be selected by the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



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

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

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

Signed:  .....

D/Registrar

### Annexure A - Form of Notice

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

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

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

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

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

Copies of the Further Amended Claim and the Second Further Amended Statement of Claim and the Orders dated 13 June 2018 in respect of this proceeding are available on the website [www.lmfmif.com](http://www.lmfmif.com) and the website [www.lminvestmentadministration.com](http://www.lminvestmentadministration.com).

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

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



David Clout & Associates

**Strategic Business Solutions**  
Level 3/26 Wharf St, Brisbane Qld 4000  
Phone: 07 3129 3316  
Email: [mgrimmond@clouts.com.au](mailto:mgrimmond@clouts.com.au)

16 November 2018

When replying please quote  
Our ref: 5812 LAMB

**TO THE CREDITOR AS ADDRESSED**

Dear Sir/Madam

**Re: Bankrupt Estate of Lamb, Ross ("the Bankrupt")  
NPII No. NSW 4313 of 2016/5**

---

I refer to my appointment, together with Patricia Talty as Joint and Several Trustees of the above Bankrupt on 14 May 2018 and to my previous report to creditors dated 14 August 2018.

By way of update, I enclose the following:

- A Report by Trustee;
- A Notice to Creditors of Proposed Resolution without Meeting (Resolution 1);
- A Notice to Creditors of Proposed Resolution without Meeting (Resolution 2);
- Proposal without a Meeting Information Sheet;
- Statement of Claim form;
- A Remuneration Approval Request Report; and
- Creditor Rights Information Sheet.

Please contact Scott Clout if you have any questions or require any further information regarding this matter.

Yours faithfully

**David Clout  
Trustee**

Encl



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## REPORT BY TRUSTEE

### Bankrupt Estate of Lamb, Ross NP11 NSW 4313 of 2016/5

I refer to my appointment, together with Patricia Talty as Joint and Several Trustees of the above Bankrupt on 14 May 2018 and to my previous report to creditors dated 14 August 2018.

I hereby report to creditors on the progress of the Bankrupt estate as follows:-

#### 1. Update on Administration of the Bankrupt Estate to date

As set out in my previous report, I have identified assets which were not disclosed by the bankrupt (including the proceeds of sale of land located in Kellyville, NSW) and a number of potential recoverable transactions. While my investigations in relation to these matters are ongoing, I remain of the view that I have an entitlement to a portion of the proceeds of the sale of land and I have identified a number of transfers of property which may be able to be set aside, leading to recoveries for the Bankrupt Estate.

The proceeds of the sale of the land, which are in excess of \$10 million, are currently held in a trust account pending determination of entitlement to the funds. I anticipate that a material portion of these funds 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. In the period since my last report, I have been in discussions and negotiations with other parties who claim an interest in the funds held on trust seeking to preserve the funds and recover the amount to which the estate is entitled. I have also sought to obtain information to support my investigations from various third party sources involved.

At the time my previous report was issued, I anticipated that the Bankrupt may make a proposal to creditors pursuant to Section 73 of the Bankruptcy Act 1966. I have not received a Section 73 proposal from the Bankrupt at this time.

Depending on the whether the Bankrupt makes a proposal to creditors and/or the outcome of my investigations, I anticipate that I may be required to commence legal proceedings in order to recover funds relating to the matters outlined above.

As disclosed in my DIRRI, The Trust Company (PTAL) Ltd had previously offered to provide the Trustees with an indemnity to meet the costs of pursuing recovery actions.

#### 2. Income Contributions

Pursuant to Section 139P (1) of the Bankruptcy Act, 1966 if the income that a bankrupt is likely to derive during a contribution assessment period as assessed by the Trustee exceeds the actual income threshold amount applicable in relation to the Bankrupt when that assessment is made, the Bankrupt is liable to pay the Trustee a contribution in respect of that period.

The former trustee conducted an assessment of the bankrupt for contribution assessment periods ending 7 November 2017 and 7 November 2018 and concluded the Bankrupt is not liable to contribute into the estate for those contribution assessment periods. I will assess the

bankrupt's liability to pay income contributions in respect of the contribution assessment period ending 7 November 2019 in due course.

### 3. Dividend to Creditors

As set out above, I have identified material assets which may be recoverable. As such, it appears that a dividend may be payable, however the extent and timing is not yet clear.

I will update creditors on the prospects of a dividend in due course.

### 4. Trustee's Receipts and Payments

I have received funding from PTAL in the amount of \$124,668.60, which has been applied to meet legal costs and my remuneration for the period to 10 August 2018. A summary of my receipts and payments is provided below.

Description	Amount (\$) (GST inclusive)
<b>RECEIPTS</b>	
Funding from PTAL	124,668.60
Interest	0.34
<b>Total Receipts</b>	<b>124,668.94</b>
<b>PAYMENTS</b>	
Trustee's remuneration	51,572.88
Trustee's legal fees	73,095.72
Bank charges	0.80
<b>Total Payments</b>	<b>124,669.40</b>
<b>Cash at bank</b>	<b>(0.46)</b>

### 5. Remuneration of Trustee

During the period from 11 August 2018 to 9 November 2018, I have accrued remuneration of \$25,288. The majority of this relates to the conduct of investigations into recoverable assets and steps taken to protect and realise those assets.

As such, I request that creditors approve my remuneration in the amount of \$25,288 (plus GST) pursuant to Section 75-40 of the Insolvency Practice Schedule (Bankruptcy) by proposing a creditors' resolution without a meeting of creditors as detailed below:

*"That the remuneration of the Trustees for the period 11 August 2018 to 9 November 2018, calculated at hourly rates as detailed in the report to creditors of 14 August 2018, is approved for payment in the sum of \$25,288, plus GST, and that the Trustees can draw the remuneration immediately or as required"*

I am also seeking creditors' approval of my future remuneration, capped to a limit of \$30,000 (excl GST), for the period 10 November 2018 to 31 March 2019, pursuant to Section 75-40 of the Insolvency Practice Schedule (Bankruptcy) by proposing a creditors' resolution without a meeting of creditors as detailed below:



*"That the future remuneration of the Trustees for the period 10 November 2018 to 31 March 2019 be calculated on a time basis at rates in accordance with David Clout & Associates' schedule of hourly rates as at 1 September 2017, and that the Trustees be authorised to pay that remuneration and any applicable GST immediately, capped to a limit of \$30,000 (Excl GST), subject to review in accordance with the Bankruptcy Act 1966"*

Details of my remuneration claims are set out in the attached Remuneration Approval Request Report.

I encourage all creditors to vote on these resolutions by completing the attached 'Proposal without a Meeting' forms and returning them to my office by 11 December 2018. If creditors have not previously submitted a 'Statement of Claim' form, this should also be completed and returned to my office.

I have requested that creditors approve my fees by a postal resolution in order to minimise the administrative costs incurred in administering this estate. If any creditor objects to the proposed resolution, and the objection is received in this office prior to 11 December 2018, it will be necessary for me to call a meeting of creditors to have my fees approved in this administration.

In this regard, I enclose the following:

- Two Notices to Creditors of Proposed Resolution without Meeting (voting forms);
- A Proposal without a meeting Information Sheet
- A Statement of Claim form; and
- A Remuneration Approval Request Report.

#### **6. Australian Financial Security Authority (AFSA)**

Bankruptcy Regulation is an independent branch of AFSA, which reports directly to the Inspector - General in Bankruptcy. It is responsible under the Act for monitoring the standards of trustees and debt agreement administrators.

Its role includes, on behalf of the Inspector-General in Bankruptcy, dealing with complaints against trustees and administrators and dealing with requests of certain decisions made by trustees.

The contact details of the Bankruptcy Regulator are:

Bankruptcy Regulation  
Regional Director  
AFSA  
GPO Box 1550  
Adelaide SA 5001

If you have any other questions regarding AFSA, additional information can be obtained from the following website:

[www.afsa.gov.au](http://www.afsa.gov.au)



Please contact Scott Clout of my office if you have any questions regarding this estate.

DATED this 16th day of November 2018.

**David Clout**  
**Trustee**

*Duplicate*

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: 8032/14

Plaintiff: KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS CAPACITY  
AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND

AND

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

ORDER

Before: Justice Jackson

Date: 17 December 2015

Initiating document: Application filed 28 October 2015

THE ORDER OF THE COURT IS THAT:

1. David Whyte as receiver of the property of the LM First Mortgage Income Fund (FMIF) be added as the second defendant in the proceeding.
2. Until further order the defendant (to be renamed the first defendant) is not required to file any defence in the proceeding.
3. On or before 23 December 2015 the second defendant:
  - (a) finalize his investigations as to the date and amounts of payments made by the first defendant as trustee of the LM Managed Performance Fund under the Deed of Assignment the subject of the proceeding into FMIF bank accounts; and
  - (b) provide the results of the investigations referred to in sub-paragraph (a) of this order to the plaintiff.
4. For the purposes of the undertaking provided by Jarrod Villani in Supreme Court Proceeding No. 3383 of 2013 and the undertaking of any servant or agent of KordaMentha Pty Ltd or Calibre Capital Ltd signed in accordance with paragraph 3 of the undertaking of Mr Villani, the Court hereby approves the interrogation, use and disclosure, solely for the purpose of this proceeding, of any Non-Fund information about or concerning the affairs of the FMIF (save for any privileged Non-Fund information) stored on the Server provided to the plaintiff which is directly relevant to:

ORDER  
Form 59 R.661

Filed on behalf of Mr David Whyte

TUCKER & COWEN  
Solicitors  
Level 1, 15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 300 300 00  
Fax: (07) 300 300 33

- (a) The allegations in paragraph 61A(a) of the further amended statement of claim; or
  - (b) Any property the plaintiff alleges it is entitled to claim by way of constructive trust over the assets of the FMIF.
- 5. The plaintiff file and serve a second further amended statement of claim by 4pm on 29 February 2016.
  - 6. The matter be listed for review on a date convenient to the court after 7 March 2016.
  - 7. The costs of the application be costs in the proceeding.

Signed:

  
Deputy Registrar



**Duplicate**

**SUPREME COURT OF QUEENSLAND**

**REGISTRY:** Brisbane  
**NUMBER:** 8034/14

**Plaintiff:** KORDAMENTHA PTY LTD (ACN 100 169 391) IN ITS CAPACITY  
AS TRUSTEE OF THE LM MANAGED PERFORMANCE FUND

AND

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

**ORDER**

**Before:** Justice Jackson

**Date:** 17 December 2015

**Initiating document:** Application filed 28 October 2015

**THE ORDER OF THE COURT IS THAT:**

1. David Whyte as receiver of the property of the LM First Mortgage Income Fund (FMIF) be added as the second defendant in the proceeding.
2. Until further order the defendant (to be renamed the first defendant) is not required to file any defence in the proceeding.
3. On or before 23 December 2015 the second defendant:
  - (a) finalize his investigations as to the date and amounts of payments made by the first defendant as trustee of the LM Managed Performance Fund under the Deed of Assignment the subject of the proceeding into FMIF bank accounts; and
  - (b) provide the results of the investigations referred to in sub-paragraph (a) of this order to the plaintiff.
4. For the purposes of the undertaking provided by Jarrod Villani in Supreme Court Proceeding No. 3383 of 2013 and the undertaking of any servant or agent of KordaMentha Pty Ltd or Calibre Capital Ltd signed in accordance with paragraph 3 of the undertaking of Mr Villani, the Court hereby approves the interrogation, use and disclosure, solely for the purpose of this proceeding, of any Non-Fund information

**ORDER**

Form 59 R.661

**TUCKER & COWEN**

Solicitors

Level 15

15 Adelaide Street

Brisbane, Qld, 4000.

Filed on behalf of Mr David Whyte

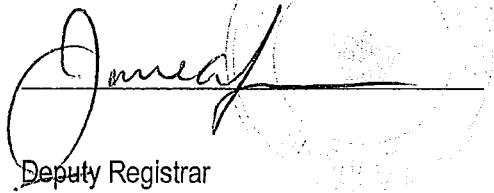
Tele: (07) 300 300 00

Fax: (07) 300 300 33

about or concerning the affairs of the FMIF (save for any privileged Non-Fund information) stored on the Server provided to the plaintiff which is directly relevant to:

- (a) The allegations in paragraph 47A(a) of the further amended statement of claim; or
  - (b) Any property the plaintiff alleges it is entitled to claim by way of constructive trust over the assets of the FMIF.
- 5. The plaintiff file and serve a second further amended statement of claim by 4pm on 29 February 2016.
  - 6. The matter be listed for review on a date convenient to the court after 7 March 2016.
  - 7. The costs of the application be costs in the proceeding.

Signed:



Deputy Registrar

## Melissa Nel

---

**From:** Ashley Tiplady <atiplady@russellslaw.com.au>  
**Sent:** Monday, 9 May 2016 10:15 AM  
**To:** David Schwarz; David O'Brien (David.O'Brien@minterellison.com); Nadia Braad (Nadia.Braad@minterellison.com)  
**Cc:** Alex Nase; Sean Russell  
**Subject:** RE: KordaMentha Pty Ltd atf the LM Managed Performance Fund v LM Investment Management Ltd (Receivers and Managers Appointed) (In Liq.) & Anor - Supreme Court of Qld Proceedings No. 8032/14 and 8034/14 ~20150298~

Colleagues

I confirm that my client will be adopting a passive role in the litigation moving forward and will not be involved in the applications to be heard later this month.

Accordingly, the others parties should deal with those issues raised below without the need for comment by my client.

Yours faithfully

**RUSSELLS**

**Ashley Tiplady**  
*Partner*

Direct 07 3004 8833  
Mobile 0419 727 626  
[atiplady@russellslaw.com.au](mailto:atiplady@russellslaw.com.au)

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Brisbane / Sydney

Postal—GPO Box 1402, Brisbane QLD 4001 / Street—Level 18, 300 Queen Street, Brisbane QLD 4000  
Telephone 07 3004 8888 / Facsimile 07 3004 8899 / ABN 38 332 782 534  
[RussellsLaw.com.au](http://RussellsLaw.com.au)

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**From:** David Schwarz [mailto:dschwarz@tuckercowen.com.au]  
**Sent:** Friday, 6 May 2016 4:33 PM  
**To:** David O'Brien (David.O'Brien@minterellison.com); Nadia Braad (Nadia.Braad@minterellison.com); Ashley Tiplady; zzz Stephanie Williamson  
**Cc:** Alex Nase  
**Subject:** KordaMentha Pty Ltd atf the LM Managed Performance Fund v LM Investment Management Ltd (Receivers and Managers Appointed) (In Liq.) & Anor - Supreme Court of Qld Proceedings No. 8032/14 and 8034/14

Dear Colleagues,

As you know, our client's Applications to strike out parts of the Third Further Amended Statement of Claim filed in each of the above proceedings, are to be heard on 31 May 2016.

We note that the Order of Justice Jackson dated 14 April 2016 provides for the matter to be listed for review on 1 June 2016 – that is, the day after the hearing of our client's Applications. It occurs to us that it would be preferable for there to be a period of time between the hearing of the Applications and the next review, so that the parties may give consideration to the outcome of the Applications (if the Applications are

determined on or shortly after the day of their hearing) or otherwise consider appropriate directions in light of the hearing of the Applications.

Would you please let us know whether you agree. If you do, we suggest that a letter in the form of the **attached** draft be sent to the Associate to Justice Jackson. We would be grateful if you could let us know whether you agree and, if you do, dates that would be suitable to your Counsel. Our client's Counsel is available for a review in the mornings of any of 6 to 9 June and on 14 or 15 June.

We anticipate that the First Defendant in each proceeding will abide the order of the Court, given the position taken by the First Defendant to date, but we would be grateful to receive confirmation that is the case.

Yours faithfully,

**David Schwarz**  
Principal

E: [dschwarz@tuckercowen.com.au](mailto:dschwarz@tuckercowen.com.au)  
D: 07 3210 3506 | M: 0438 400 348 | T: 07 300 300 00 | F: 07 300 300 33  
Level 15, 15 Adelaide Street, Brisbane | GPO Box 345, Brisbane Qld 4001  
TCS Solicitors Pty Ltd. | ACN 610 321 509

**Tucker&CowenSolicitors.**

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# Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane, Qld. 4000 / GPO Box 345, Brisbane, Qld. 4001.  
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / [www.tuckerandcowen.com.au](http://www.tuckerandcowen.com.au)

Our reference: Mr Schwarz / Mr Nase

18 April 2018

Your reference: Mr O'Brien / Mrs Braad

Minter Ellison Lawyers  
Level 22 Waterfront Place  
1 Eagle Street  
Brisbane Qld 4000

Email:  
[david.obrien@minterellison.com](mailto:david.obrien@minterellison.com)  
[nadia.braad@minterellison.com](mailto:nadia.braad@minterellison.com)

Principals.  
Richard Cowen.  
David Schwarz.  
Justin Marschke.  
Daniel Davey.

Consultant.  
David Tucker.

Special Counsel.  
Geoff Hancock.  
Alex Nase.  
Brent Weston.

Associates.  
Marcelle Webster.  
Emily Anderson.  
Olivia Roberts.  
James Morgan.  
LMcCott Hornsey.  
Robert Tooth.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Management Performance Fund (MPF) (*KordaMentha*) v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) (LMIM) and David Whyte in his capacity as court appointed receiver of the property of the LM First Mortgage Income Fund (FMIF) (*Mr Whyte*) – Supreme Court of Queensland Proceeding 8032/14 (*KPG Loan Proceeding*)

KordaMentha v LMIM and Mr Whyte – Supreme Court of Queensland Proceeding 8034/14 (*Lifestyle Loan Proceeding*)

LMIM as responsible entity of the FMIF v LMIM - Supreme Court of Queensland Proceeding 11560/16 (*Breach of Trust Proceeding*)

1. We act for Mr Whyte in each of the KPG Loan Proceeding, the Lifestyle Loan Proceeding and the Breach of Trust Proceeding.
2. In circumstances where it would seem that the KPG and Lifestyle Loan Proceedings may proceed, we write to raise two issues that are important to their future management and conduct. Relevantly, as we understand the allegations made by your client in those proceedings, they involve the following series of propositions by your client:
  - (a) *First*, that LMIM acted in breach of trust as the trustee of the MPF by entering into a series of transactions involving the KPG Loans and the Lifestyle Loan, as a result of which the MPF suffered loss for which it is entitled to equitable compensation from LMIM.
  - (b) *Second*, that in entering into each of those transactions, LMIM was also acting as trustee and responsible entity of the FMIF.
  - (c) *Third*, that, as a result, LMIM has a right of indemnity against the assets of the FMIF to exonerate it of its liability to pay equitable compensation to the MPF.
  - (d) *Fourth*, that your client is entitled to subrogate to and thereby to itself enforce LMIM's right of indemnity against the assets of the FMIF.
3. The purpose of this correspondence is to raise two matters for your consideration, regarding the third and fourth propositions. Specifically:
  - (a) *First*, we believe that your client may have an interest in the Breach of Trust Proceeding being defended. That is because, as we explain below, the effect of the clear accounts rule includes that your client's ability, if any, to be afforded monetary relief against the assets of the FMIF, if the claims made by your client in the KPG and Lifestyle Loan Proceedings are otherwise successful, depends on the outcome of the Breach of Trust Proceeding. We ask you to consider and advise us of your position on this issue.

- (b) *Second*, we ask that you clarify or confirm how your client proposes to address the effect of section 601FH(b) of the *Corporations Act 2001* (Cth) (the Act) on any right of subrogation, which might otherwise have been available to your client.

#### The Breach of Trust Proceeding

4. We refer to our emails to you dated 16 December 2016, by which we provided you with a copy of the Claim and Statement of Claim filed in the Breach of Trust Proceeding.
5. We advise that our client has filed an Amended Claim and Statement of Claim, and Consolidated Particulars, copies of which are enclosed for your consideration.
6. Relevantly, and as you are aware, a trustee's right of indemnification is subject to the rule known as the 'clear accounts rule'.
7. The existence of that rule was noted by Justice Applegarth in his Honour's judgment in the KPG and Lifestyle Loan Proceedings: see [2016] QSC 183 at [21].
8. More recently, it was the subject of specific consideration and findings by Justice Jackson in related proceedings: see [2017] QSC 230 at [124] to [143]. In that case, LMIM (as the Second Applicant) had asserted a right of indemnity against the assets of the FMIF, which was resisted by Mr Whyte on the basis of the clear accounts rule.
9. Specifically, we draw your attention to paragraphs [137] to [143] of Justice Jackson's judgment, as follows (footnotes omitted):

[137] In some quarters, the clear accounts rule is seen as derived from the rule in *Cherry v Boulton*. A reasonable argument exists that it is either separable from or a sub-set of the principles for which *Cherry v Boulton* is often cited. The Court of Appeal in *Re Dacre, Whitaker v Dacre*, without considering *Cherry v Boulton*, acted on the footing that there was a long series of authorities that "a defaulting trustee cannot claim a share in the estate unless and until he has made good his default" and that the rule is based on the theory "that the [c]ourt treats the trustee as having received his share by anticipation", meaning that the trustee is treated as already having received its share to the extent of the default. Modern statements do not gainsay those propositions.

[138] In *RWG Management*, Brooking J considered and rejected an argument that a trustee was prevented from making a claim for indemnity for expenses against the estate until it has made good the loss to the estate from default, in the sense of payment of the amount of the default. Instead, he accepted that the counter-liabilities were to be applied (as if set off) against each other on the principle set out above, so that the trustee is entitled to any excess in its favour.

[139] To the extent that the reasons of Gordon J in *Australian Securities and Investments Commission v Lettern and ors (No 17)* suggest that the trustee's obligation to make good the default is a condition precedent to the right to an indemnity, in my view, they should not be taken as requiring anything more than the process of reducing the amount of the right by the amount of the counter-liabilities in accordance with the principle stated by Brooking J, as already mentioned.

[140] That may mean that the net amount of the right to an indemnity will not be capable of ascertainment until the amount of the loss caused by the breach of trust that is the basis of the counter-liability can be established. But that is a procedural matter, not an element of the right to indemnity or a matter of substantive defence. Hence, in my view, the statement of Young CJ in *Warne v GDK Financial Solutions Pty Ltd; Billingham v Parberry* that the trustee has a *prima facie* right to indemnity but an order for accounts will be made if there is doubt about a default that suspends the right of the trustee while the accounts are taken is correct. This reflects how matters would have proceeded in an administration action in equity involving an allegation of breach of trust.

[141] Gordon J in *Lettern* accepted that a breach of certain "core" duties will as a matter of course result in a loss of the right to indemnity for an associated expense. However, it is necessary to distinguish that statement from the operation of the clear accounts rule or the wider rule in *Cherry v Boulton*. That statement was not concerned with either principle,

but a trustee's right to indemnity for an expense incurred in connection with the postulated breach of a core duty. There is no principle that the operation of the clear accounts rule is confined to a trustee's right to indemnity for an expense connected with a breach of trust.

[142] Following these steps, in the present case, reduction of the amount of the right of indemnity by the amount of the claim for the counter-liabilities in proceeding BS11560/16 [i.e. the Breach of Trust Proceedings] would exceed the amounts claimed by LMIM for payment for indemnity for expenses, even if the claim for indemnity were otherwise accepted as one made for expenses properly incurred by LMIM as trustee or responsible entity.

[143] It follows that the clear accounts rule operates to "suspend" the claimed right to payment from the assets of the FMIF until the resolution of that claim and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the claim in proceeding BS11560/16 is resolved.

10. Those findings are directly applicable to your client's claims in the KPG and Lifestyle Loan Proceedings. Relevantly, even in the event that your client is entirely successful in establishing a right to equitable compensation against LMIM, and in establishing a *prima facie* right for LMIM to be indemnified against the assets of the FMIF, that right of indemnity:
  - (a) is suspended until the Breach of Trust Proceeding is resolved; and
  - (b) may not be productive of a money order in LMIM's or (subject to what we say below, by subrogation) your client's favour, in the event that LMIM is found to have counter-liabilities to the FMIF for breach of trust in the Breach of Trust Proceeding exceeding the amount of any compensation to which your client is found to be entitled.
11. We are instructed that our client intends to raise the clear accounts rule in response to the indemnity asserted by your client in the KPG and Lifestyle Loan Proceedings, and in doing so to rely on the breaches of trust alleged in the Breach of Trust Proceeding.
12. With the above in mind, we note that our client is required to approach the Court for directions under section 59 of the *Trusts Act* 1973 as to who should represent the differing interests in the Breach of Trust Proceeding, because LMIM is on both sides of the record in different capacities.
13. Our client is of the view that it ought to bring the required application under section 59 of the *Trusts Act* without further undue delay.
14. To that end, we have corresponded with the liquidators of LMIM about the appropriate directions to be made. They have advised that they are without funds, and that consequently they do not intend to take any active role in the proceeding.
15. Although our client considers the liquidators of LMIM to be appropriate persons to represent LMIM's interests as the defendant to the allegations made in the Breach of Trust Proceeding, nonetheless we are drawing all of this to your attention because, in light of the effect of the clear accounts rule, it seems to us that your client has a clear interest in the Breach of Trust Proceedings being actively defended.
16. We ask that you consider these matters and advise us of your client's position by Wednesday, 16 May 2018.

#### The existence of a right of subrogation

17. In both the KPG and Lifestyle Loan Proceedings, your client asserts a right of subrogation, that it is alleged entitles your client to exercise LMIM's right of indemnity against the assets of the FMIF.

18. In that regard, we draw your attention to section 601FH(b) of the Act, which relevantly provides as follows:

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated: ... (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

19. As to the purpose and intended effect of this provision, we draw your attention to the comments of the Australian Law Reform Commission (ALRC) in its report No. 45 (General Insolvency Inquiry) at [259] and [260], as follows:

[259] *Trust creditors' derivative rights.* ... If, consequent upon the insolvency of a trustee, each creditor were to be allowed to claim separately against the trust fund or a beneficiary it would be time-consuming and expensive, prevent the orderly administration of the trust fund and prejudice the creditors who had not exercised such a right.

[260] *Liquidator to exercise trust creditors' derivative rights.* To avoid such multiple actions it was proposed in DP 32 (para 184) that upon the insolvency of a corporate trustee the liquidator should exercise the right of indemnity on behalf of all trust creditors. Submissions to the Commission supported this proposal ...

*Recommendation*

[261] The Commission therefore recommends that, upon the insolvency of a corporate trustee, the exercise of the right of indemnity against both the trust property and the beneficiaries (if such a right exists) should be a 'collective' right exercisable by the company, through its liquidator, on behalf of all trust creditors. ...

20. These comments were adopted by ALRC Report 65 (Collective Investments: Other People's Money) at paragraph 8.8 (page 76), which led to the enactment of the Managed Investments Act 1998,<sup>1</sup> and thereby to section 601FH(b) of the Act.

21. As such, it seems to us that the purpose and effect of section 601FH(b) of the Act is to exclude any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets.


22. If that is correct, it seems to us that:

- (a) section 601FH(b) of the Act defeats your client's purported exercise of a right to be subrogated to LMIM's rights of indemnity from the assets of the FMIF;
- (b) your client can of course pursue relief against LMIM, but it must rely on LMIM to exercise such rights of indemnity as may be available to it against the assets of the FMIF, subject to the operation of the clear accounts rule.

23. In light of this, we ask that your client clarify or confirm its position as to how it intends to overcome the effect and the operation of section 601FH(b) of the Act or why it asserts that s 601FH(b) does not have the effect suggested in this letter, by Wednesday, 16 May 2018.

24. If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us. We reserve all of our client's rights.

Yours faithfully

  
Alex Nase  
Tucker & Cowen

Direct Email: anase@tuckercowen.com.au  
Direct Line: (07) 3210 3503

<sup>1</sup> See paragraphs 1.1 and 8.26 of the Explanatory Memorandum to the Managed Investments Bill 1997.

Encl.

# Tucker&CowenSolicitors.

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Our reference: Mr Schwarz / Mr Nase  
Your reference: Mr O'Brien / Mrs Braad

3 May 2018

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Olivia Roberts.  
Ashley Moore.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No 12716/15

We refer to the above matter.

We note that it has been over one year since your client took a step in this proceeding and your client must give one month's notice before proceeding.

We also note that your client has agreed to give our client, and LMIM, 28 days' notice before any defence is required.

It seems to our client that your client ought to either take steps to progress its claim in the proceeding or alternatively, discontinue the proceeding.

This is particularly so when the winding up of both the FMIF, and the MPF, cannot be completed until the various legal proceedings on foot are concluded.

We would be grateful if you could let us know your client's intention with respect to this proceeding within seven days.

Yours faithfully



Alex Nase  
Tucker & Cowen

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Individual liability limited by a scheme approved under Professional Standards Legislation.

# MinterEllison

28 May 2018

## BY EMAIL

Mr David Schwarz and Mr Alex Nase  
Tucker & Cowen  
Level 15  
15 Adelaide Street  
BRISBANE QLD 4000

Dear Colleagues

**KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v  
LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme  
Court of Queensland Proceeding No BS12716/15**

We refer to your letters dated 3 and 10 May 2018.

We accept that our client must give each of the defendants 28 days' notice before any defence is required to be filed.

Our client has no present intention of giving such a notice.

You have asked our client to either prosecute BS12716/15 or discontinue it because the winding up, relevantly of FMIF cannot be completed until various legal proceedings including BS12716/15 are concluded.

Amongst these legal various proceedings are BS12317/14, BS2166/15, BS11560/16 and BS13534/16, all of which have been commenced by your client, are complex, are seeking remedies involving tens of millions of dollars each and will take years to complete. There is no prospect in the near term of your client being in a position to complete the winding up of FMIF due to the actions he has commenced.

Our client is the eighth defendant in action BS12317/14, and has decided to concentrate its available trust funds in defending that action. If it is successful in doing so, it will likely deploy the significant costs your client will be obliged to pay it, in prosecuting action BS12716/15.

Therefore, your client will not suffer the prejudice it points to by action BS12716/15 remaining in its current state.

We trust this letter answers your request to let your know our clients intention with respect to proceeding BS12716/15.

Yours faithfully

MinterEllison

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Ashley Moore.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("AIIS Proceeding")

We refer to your letter dated 28 May 2018, which responded to our letters to you of 3 and 14 May 2018.

Your client's continuing delay in prosecuting the AIIS Proceeding

Our client remains of the view that your client's continued delay in this proceeding is unjustified, and that your client ought to either take steps to expeditiously progress its claim or discontinue the proceeding.

As you are aware, rule 5(3) of the *Uniform Civil Procedure Rules* provides that a party impliedly undertakes to the Court to proceed in an expeditious way. In our client's view, that implied undertaking requires that your client not delay further in progressing the AIIS proceeding.

The Claim in the AIIS Proceeding was filed on 16 December 2015, your client has not taken any step in the proceeding since service of the Claim and Statement of Claim on LMIM on or about 28 November 2016 and has not required a defence, or given notice that a defence is required.

Your letter suggests that this ongoing delay is justified because (as we understand the explanation) your client has not yet decided whether it will prosecute the AIIS Proceeding, does not presently have the resources to do so, and may only have sufficient resources if your client is successful in defending the proceedings commenced by LMIM (at the instigation of our client) against it, and in obtaining a substantial costs order against our client. With respect, these matters suggest that your client considers it appropriate to commence proceedings and then prosecute them at leisure, without any direction of the Court that it is justified in doing so, and in the meantime leaving them as a form of 'sword of Damocles' hanging over LMIM and the LM First Mortgage Income Fund ("FMIF"). Our client does not consider that to be in any way appropriate or consistent with the implied undertaking under Rule 5.

We further observe that the approach suggested in your letter is inconsistent with what was said by Mr Villani in his affidavit filed in support of your client's application for leave to proceed against LMIM in the AIIS Proceeding. At paragraphs 53 to 58 of that affidavit, Mr Villani deposed to his reasons for seeking a direction that the defendant (LMIM) not be obliged to file a notice of intention to defend and defence until 28 days after your client gives notice to LMIM requiring a defence to be filed.



In the result, Daubney J made orders on 22 November 2016 which included a direction in those terms, but also in terms that your client give notice to our client as receiver of the FMIF, by notice to this firm.

Mr Villani's reasons, as explained in his affidavit, were that:-

1. There were settlement negotiations underway at the time;
2. If there were to be a settlement, then the settlement would likely be the subject of applications for approval;
3. There may be some controversy, for a time, as to who (as between LMIM's liquidators and our client) would be responsible for the carriage of the defence of the AIIS Proceeding; and
4. Your client had not yet obtained a direction from the Court under section 96 of the *Trusts Act 1973* (Qld) that it is justified in prosecuting the AIIS Proceeding.

Mr Villani's reasons, as explained in his affidavit, did not include any mention of the resources available to your client.

Since your client's application for leave to proceed, it has become apparent that the settlement negotiations mentioned in the affidavit have been unsuccessful. To the extent (if any) to which there might be some controversy as to the representation on the defendant's side of the record, we note that our client has had the carriage of the defence of two other proceedings commenced by your client for similar relief (namely, Supreme Court of Queensland proceedings 8032/14 and 8034/14) under Orders made by the Court joining our client as the second defendant in each proceeding. We anticipate a similar regime would address any issue of representation in the AIIS Proceeding.

Your client has not made any application for directions under section 96 of the *Trusts Act*, nor has your client indicated when it intends to do so, notwithstanding that Mr Villani deposed to an intention to make that application in the first half of 2017; at least a year ago.

In the circumstances, our client does not accept that any further delay in your client's prosecution of the AIIS Proceeding is warranted.

#### Suggestion of lack of prejudice to the FMIF

We are instructed that our client does not accept that it will necessarily take years to bring proceedings BS12317/14, BS2166/15, BS11560/16 and BS13534/16 to a conclusion. We are instructed that Supreme Court proceeding BS12317/14 is likely to be listed for trial early next year. BS11560/16 may not ultimately be defended. It is also possible that one or more of the proceedings may settle.

In any case, even if it does take some time for those other proceedings to be determined or resolved, that does not justify delay by your client in this proceeding.

Your client's suggestion that, if it succeeds in its defence of BS12317/2014 and obtains a costs order in its favour, it will use the funds paid pursuant to such costs order to fund its prosecution of this proceeding, does not appear to our client to withstand closer scrutiny.

Your client pleads the 'clear accounts rule' in its defence of BS12317/2014 and refers to, *inter alia*, the claims made in this proceeding (the AIIS Proceeding) in support of that defence. However, the application of the clear accounts rule cannot be determined in the abstract, without consideration of, and factual findings as to whether, the alleged breaches of trust (the countervailing claims) are made out. A party relying upon the clear accounts rule, must prove the alleged breaches of trust

and the losses suffered as a result thereof, either in the proceeding in which the defence is pleaded, or in a separate proceeding. Presently, your client's Defence in BS12317/2014 simply refers to the claims pleaded in other proceedings (including the AIIS Proceeding) as a basis for invoking the clear accounts rule.

Of those claims mentioned in the Defence:-

1. two (BS8032/14 and BS8034/14) are the subject of your client's application for directions as to whether your client is justified in discontinuing the proceedings;
2. one is a proceeding in which LMIM is the defendant, but that does not concern the FMIF (in that no relief is sought against the property of the FMIF). We are not aware of any step having been taken in that proceeding following your client obtaining leave to proceed by Order of Atkinson J on 1 February 2018; we understand that the leave granted was conditional upon your client giving notice to the defendant in that proceeding by 31 January 2019, requiring a notice of intention and defence to be filed, failing which the leave to proceed would be revoked;
3. The only remaining proceeding, pleaded in the Defence to BS12317/2014 as providing grounds to invoke the clear accounts rule, is the AIIS Proceeding.

It may be the case that, before your client's defence based on the clear accounts rule in BS12317/2014 could be determined, your client would, in any event, have to run its claim in this proceeding, in which case your client may not in fact be able to obtain a costs order in BS12317/2014 and use the funds paid to it under the costs order, to fund its prosecution of this proceeding. Your client cannot, in any event, litigate at leisure.

Our client again requests that your client either takes steps to progress, or discontinue, this proceeding.

#### Issues in relation to the Statement of Claim

Our client considers it desirable to draw your client's attention to certain key issues relating to its Statement of Claim, at an early stage, so as to enable your client to consider its position, before substantial costs are incurred.

We note that in the Statement of Claim, your client seeks:-

1. equitable compensation against LMIM in the sum of \$16,820,356.30 ("Equitable Compensation Claim");
2. a declaration that LMIM as trustee of the FMIF holds the amount of \$3,905,721.81 on constructive trust for your client ("Constructive Trust Claim"); and
3. declarations to the effect that your client is entitled to be indemnified out of assets of the FMIF in respect of the alleged liability the subject of the proceeding, in respect of the amount of \$3,905,721.81, and that it is entitled to be subrogated to LMIM's alleged rights of indemnity ("Indemnity Claim").

Of these claims, only the Constructive Trust Claim and the Indemnity Claim are claims against assets of the FMIF. The Equitable Compensation Claim may, of itself, be of no practical utility.

#### *Constructive Trust Claim*

The Constructive Trust claim appears at paragraphs 115 to 117 of the Statement of Claim.

In those paragraphs, it is alleged that:-

1. LMIM as trustee of the MPF held assets of the MPF on Trust for the beneficiaries of the MPF;
2. LMIM was aware that the payments to itself aff the FMIF, or alternatively, to PTAL as custodian of the FMIF, of \$3,905,721.81 were made in breach of trust;
3. In so far as PTAL "may" hold in its capacity as custodian of the FMIF, the sum of \$3,905,721.81, or assets representing "the value it received" from the payments of \$3,905,721.81, it holds those assets as agent for LMIM as RE of the FMIF;
4. LMIM holds those assets on constructive trust for the Plaintiff in its capacity as trustee of the MPF.

Significantly, there is no pleading of any material facts in support of any tracing process or any identifiable assets into which the payments of \$3,905,721.81, allegedly made to LMIM as Responsible Entity ("RE") of the FMIF in breach of duty, can be traced.

In the absence of a pleading of such material facts, our client would respectfully suggest that the Constructive Trust Claim is bound to fail and ought to be abandoned by your client.

#### *Indemnity Claim*

Our client wishes to raise the following issues in relation to the Indemnity Claim:

1. Firstly, the clear accounts rule may provide a defence to the claim; and
2. Secondly, the Indemnity Claim appears to be unsustainable by reason of s 601FH(b) of the *Corporations Act 2001* ("the Act").

On 18 April 2018, we sent a detailed letter to you about both of these issues in the context of BS8032/14 and BS8034/14. We refer to that letter; in particular, the authorities cited therein in relation to the clear accounts rule, and the observations therein as to the purpose and intended effect of s s 601FH(b). We will therefore endeavour to deal with these issues, and their relevance to this proceeding, briefly.

#### Clear Accounts Rule

As you know:-

1. a trustee's right of indemnification is subject to the rule known as the clear accounts rule;
2. in essence, the clear accounts rule is that a trustee who has committed breaches of duty is not entitled to exercise any right of indemnity out of the trust fund, until the trustee has first made good any loss arising out of the previous breaches of trust. In effect, the clear accounts rule requires a set-off between the trustee's right of indemnity and its liability for the previous breaches of trust. If there is doubt about whether the trustee has committed a breach of trust by reason of claims made in another proceeding, the right of indemnity may be suspended until the other proceeding is resolved: see judgment of Justice Jackson in *Park & Muller (Liquidators of LM Investment Management Ltd v Whyte No 3* [2017] QSC 230 at [134] to [143];
3. our client, in the name of LMIM as RE of the FMIF, has filed an Amended Claim and Statement of Claim in BS11560/16 ("the Breach of Trust Proceeding"), making claims against LMIM for various breaches of trust.

We are instructed to convey to you that:

1. if joined as a defendant to this proceeding (the AIFS Proceeding), our client intends to rely upon the clear accounts rule and the claims made in the Breach of Trust Proceeding in defence of the claims made in this proceeding against assets of the FMIF;
2. the quantum of the claims made in the Breach of Trust Proceeding are presently estimated at in excess of \$30 million plus interest and costs, which, if successful, will be more than sufficient to overwhelm the claims made by your client against FMIF assets in this proceeding; and
3. therefore, your client's ability to be afforded monetary relief against assets of the FMIF with respect to the claims the subject of this proceeding, if they are otherwise successful, will likely depend upon the outcome of the Breach of Trust Proceeding.

We are therefore instructed to again give your client notice that it may have an interest in the Breach of Trust Proceeding being defended, and ask that you advise us of your client's position in this regard within seven days.

Statutory exclusion of creditor's right of subrogation

As you know, section 601FH(b) of the Act, relevantly provides as follows:

*If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:*

...

*(b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.*

It seems to our client, for reasons explained in our correspondence to you dated 18 April 2018 in relation to BS8032/14 and BS8034/14, that the purpose and effect of section 601FH(b) of the Act is to exclude any right that might otherwise be exercisable by a creditor of a registered scheme to be subrogated to the responsible entity's right to be indemnified (by exoneration) from the scheme's assets.

If that is correct, it seems to us that:

1. section 601FH(b) of the Act operates as a statutory bar to your client's purported exercise of a right to be subrogated to LMIM's alleged rights of indemnity from the assets of the FMIF; and
2. while your client might pursue relief against LMIM, it must rely on LMIM to exercise such rights of indemnity as may be available to it against the assets of the FMIF, subject to the operation of the clear accounts rule.

In light of this, we ask that your client clarify or confirm its position as to how it intends to overcome the effect and the operation of section 601FH(b) of the Act or why it asserts that s 601FH(b) does not have the effect suggested in this letter, within seven days.

Joinder of Mr Whyte

We note that our client is not presently a party to this proceeding.

As you are aware, our client was appointed, pursuant to Orders of Dalton J dated 21 August 2013, as the person responsible for ensuring that the FMIF is wound up in accordance with its Constitution, and as receiver of the property of the FMIF.

Our client intends to apply to Court for directions as to whether he would be justified in seeking to be joined as a defendant to this proceeding in his capacity as Court Appointed Receiver of the property of the FMIF, to defend the claims made against FMIF assets in the proceeding and for orders joining him as a defendant.

You would recall that a similar application was made by our client in BS8032/14 and BS8034/14, and our client was joined as a defendant.

Would you please advise whether your client consents to our client being joined as a defendant to this proceeding, within seven days of the date of this letter.

#### Conclusion

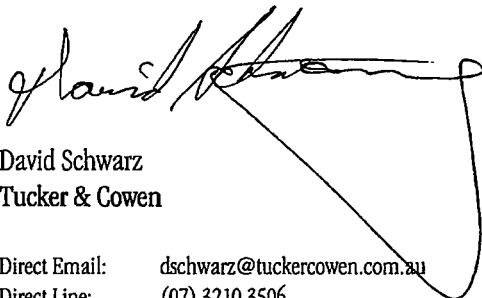
Would you please provide us with your client's response to this letter within seven days.

In the absence of a satisfactory response within that timeframe, we reserve our client's right to apply to Court to be joined as a defendant, or to take such other steps as he may be advised, without further notice.

If you have any queries about any of the issues raised by this correspondence, please do not hesitate to contact us.

We reserve all of our client's rights.

Yours faithfully



David Schwarz  
Tucker & Cowen

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Individual liability limited by a scheme approved under Professional Standards Legislation.

25 June 2018

RECEIVED

25 JUN 2018

BY: 10:00 am

**BY HAND**

Mr David Schwarz and Mr Alex Nase  
Tucker & Cowen  
Level 15  
15 Adelaide Street  
BRISBANE QLD 4000

Dear Colleagues

**KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15**

We refer to our letter dated 28 May 2018, and to your letter dated 4 June 2018.

You complain in your letter that Mr Villani in his affidavit sworn on 17 November 2016, did not mention that the MPF's limited resources were an impediment to KM (MPF) prosecuting proceeding BS12716/15. At the time Mr Villani swore his affidavit, he had a reasonable expectation that proceeding BS12317/14 which was then the subject of settlement negotiations, would settle. Such a settlement would not only have ended the considerable drain upon the MPF of defending proceeding BS12317/14, but was expected to yield for the MPF a settlement sum. These expectations were not fulfilled because negotiations with the directors of LMIM broke down in December 2017; and, with your client earlier this year. That is to say, the position outlined in our letter of 4 June 2018, is the current position.

To accommodate our respective client's current positions, our client proffers the following undertaking:

If Mr Whyte succeeds after all appeals (if any) are exhausted in obtaining the relief he seeks against the eighth defendant ("KM (MPF)") in proceeding BS12317/14, KM (MPF) will, subject to obtaining a direction pursuant to section 96 of the *Trusts Act* 1973 (Qld), ("S 96 Application") that it would be justified in discontinuing proceeding BS12716/15, forthwith discontinue proceeding BS12716/15.

KM (MPF) also undertakes to:

- (a) prosecute diligently any S 96 Application; and
- (b) give your client notice of any S 96 application.

Please advise in writing by 9 July 2018 if your client accepts our client's undertaking.

Our client reserves its right to respond to the balance of your letter dated 4 June 2018, should that become necessary. Further, our client reserves its rights generally.

Yours faithfully,

MinterEllison

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# MinterEllison

25 June 2018

RECEIVED

25 JUN 2018

BY: 10:00 am

## BY HAND

Mr David Schwarz and Mr  
Tucker & Cowen  
Level 15  
15 Adelaide Street  
BRISBANE QLD 4000

Dear Colleagues

**KordaMentha Pty Ltd ("K  
("MPF") v LM Investment  
Supreme Court of Queen**

We refer to our letter dated

You complain in your letter  
that the MPF's limited resc  
At the time Mr Villani swor  
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If Mr Whyte succeed  
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KM (MPF) also und

- (a) prosecute
- (b) give your c

Please advise in writing b

Our client reserves its right  
become necessary. Furth

Yours faithfully

**MinterEllison**

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**MinterEllison**

BY: 10:00 am

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25 JUN 2018



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# Tucker & Cowen Solicitors.

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Our reference: Mr Schwarz / Mr Nase  
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26 June 2018

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Brent Weston.

Associates.  
Marcelle Webster.  
Emily Anderson.  
James Morgan.  
Scott Hornsey.  
Robert Tooth.

Dear Colleagues

KordaMentha Pty Ltd in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) ("LMIM") – Supreme Court of Queensland Proceeding No 12716/15 ("ALIS Proceeding")

We refer to your letter dated 25 June 2018.

Our client does not accept the undertaking offered by your client.

The proposed undertaking is unsatisfactory, because the winding up of the FMIF cannot be completed until the remaining legal proceedings are concluded.

Indeed, at a recent Court hearing, His Honour Boddice J observed to the effect that there ought to be a timeline for the resolution or determination of the remaining legal proceedings.

Our client is considering applying to Court for an order that he be joined as a defendant to the proceeding, and for directions with respect to the future conduct of the proceeding.

Our letter to you dated 4 June 2018 requested that you let us know within seven days whether your client consents to our client being joined as a defendant to the proceeding. No response to that request has been received.

Would you please let us know whether your client consents to our client being joined as a defendant to this proceeding, by no later than close of business on Friday, 29 June 2018.

Yours faithfully



Alex Nase  
Tucker & Cowen

Direct Email: [anase@tuckerandcowen.com.au](mailto:anase@tuckerandcowen.com.au)  
Direct Line: (07) 3210 3503

Individual liability limited by a scheme approved under Professional Standards Legislation.



# MinterEllison

3 July 2018

## BY EMAIL

Mr David Schwarz and Mr Alex Nase  
Tucker & Cowen  
Level 15  
15 Adelaide Street  
BRISBANE QLD 4000

Dear Colleagues

**KordaMentha Pty Ltd ("KM") in its capacity as trustee of the LM Managed Performance Fund ("MPF") v LM Investment Management Ltd (Receivers & Managers Appointed) (In Liquidation) – Supreme Court of Queensland Proceeding No BS12716/15**

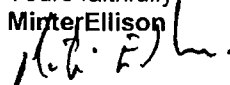
We refer to your letter dated 26 June 2018.

Our client has decided to discontinue this proceeding if so directed by the Court acting pursuant to section 96 of the *Trusts Act* 1973 (Qld).

In these circumstances, it is unnecessary for your client to become a party to this proceeding.

We will keep you informed of the progress of our client's application.

Yours faithfully

**MinterEllison**  


Contact: David O'Brien T: +61 7 3119 6159  
F: +61 7 3119 1159 david.obrien@minterellison.com  
Partner: David O'Brien T: +61 7 3119 6159  
OUR REF: DOB 407747963

Cc: Mr Mark Waller  
Clayton Utz



## BUSINESS RESTRUCTURING RATES

Staff Category	Effective 1 July 2017	Effective 1 July 2018
	(\$)	(\$)
1 Partner	580	595
2 Associate Director	495	510
3 Senior Manager	470	485
4 Manager	430	445
5 Assistant Manager	390	400
6 Senior Accountant I	350	360
7 Senior Accountant II	310	320
8 Accountant I	255	265
9 Accountant II	215	220
10 Financial Assistant	215	220
11 Undergraduate	175	180
12 Practice Assistant	170	175
13 Administration Assistant	95	100

\*All amounts are exclusive of GST

## CORPORATE FINANCE CHARGE RATES

	Staff Category	Effective 1 July 2017 (\$)	Effective 1 July 2018 (\$)
1	Partner	560	570
2	Executive Director	495	505
3	Associate Director	495	505
4	Senior Manager	430	440
5	Manager	375	385
6	Assistant Manager	335	345
7	Senior Analyst - Experienced	295	305
8	Senior Analyst	265	275
9	Analyst	225	235
10	Graduate Analyst	205	215
11	Practice Assistant	145	150
12	Undergraduate	185	185

\*All amounts are exclusive of GST

## TAX CHARGE RATES

	Staff Category	Effective 1 July 2017 (\$)	Effective 1 July 2018 (\$)
1	Partner	680	710
2	Executive Director	600	615
3	Associate Director	590	620
4	Senior Manager	540	565
5	Manager	450	465
6	Assistant Manager	400	430
7	Senior Consultant - Experienced	360	375
8	Senior Consultant	280	295
9	Consultant	240	255
10	Graduate Consultant	190	200
11	Practice Assistant	150	155
12	Cadet	130	135

\*All amounts are exclusive of GST

## AUDIT CHARGE RATES

	Staff Category	Effective 1 January 2018 (\$)
1	Partner - Clark Jarrold	580
2	Partner - Wayne Basford	570
3	Partner	515
4	Associate Director	430
5	Senior Manager	400
6	Manager	350
7	Assistant Manager	310
8	Senior Auditor - Experienced	270
9	Senior Auditor	245
10	Auditor	200
11	Graduate Auditor	165
12	Associate Director	160
13	Practice Assistant	130
14	Assistant Auditor	130
15	Junior Team Assistant	125

\*All amounts are exclusive of GST