

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane  
NUMBER: BS3508/2015

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

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

AND

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

AND

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

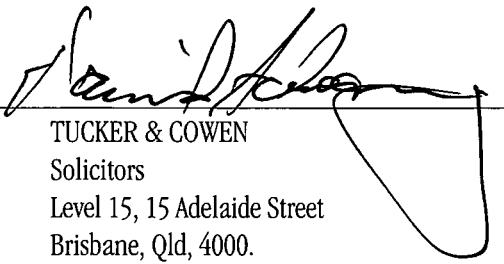
AFFIDAVIT OF DAVID WHYTE

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

1. I am a Registered Liquidator and partner of the firm BDO.
2. I was appointed in proceeding 3383/13 pursuant to the Order of the Honourable Justice Dalton dated 21 August 2013 as the person responsible for ensuring the winding up of the FMIF in accordance with its Constitution, and as receiver of the FMIF.
3. The terms of my appointment are set out in those orders, as well as the orders made in this proceeding by the Honourable Justice Jackson dated 17 December 2015 (the **December 2015 Orders**) , as varied by orders dated 18 July 2018.

AFFIDAVIT:  
Form 46, R.431


Filed on behalf of the Respondent

  
TUCKER & COWEN  
Solicitors  
Level 15, 15 Adelaide Street  
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Tel: (07) 300 300 00  
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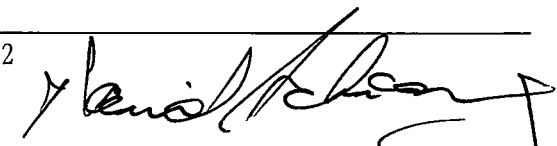
4. Now produced and shown to me and marked "DW-125" is an indexed, paginated bundle of the documents referred to in this Affidavit ("the Bundle").

**Role in responding to the Application**

5. I am cognisant that my role in relation to the application filed 10 October 2018 ("Application"), as a receiver appointed by this Honourable Court upon the application of the Australian Securities & Investment Commission (ASIC) and Mr Roger Shotton, is not that of a true contradictor, insofar as the orders sought by the Application relate to the continuation of my appointment over the assets of the FMIF.
6. I understand that Mr Park was required to notify ASIC of the Application, and I understand that this has occurred. I also understand that Mr Shotton has been notified of the Application as a member of the FMIF, pursuant to the directions made by this Honourable Court on 3 October 2018.
7. I am informed by my solicitor, Mr David Schwarz, and believe, that he has very recently received correspondence from Mr Hugh Copley of ASIC, in which Mr Copley:
- (a) indicates that ASIC "does not wish – unless required by the Court – to take a formal role in the Application. These instructions are motivated by the finite resources at ASIC's disposal and by ASIC's desire (consistent with ASIC's position taken in the Dalton proceeding and subsequent appeal) not to further erode the likely return to the unitholders of the FMIF ..."
  - (b) states that "ASIC is anxious to understand what, if any, assistance it might be able to provide to the Court on the Application";
  - (c) seeks Russells' response to two specific matters regarding the orders sought in the Application, and the basis upon which they seek to revisit the existing arrangements.
8. A copy of that correspondence, which has been provided to me, is at pages 1 to 2 of the Bundle.
9. I am not presently aware of the attitude of Mr Shotton to the Application.

  
Signed:

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Witnessed by:

10. In the circumstances, but subject to any direction of this Honourable Court, my present intention is to appear at the hearing on 10 December 2018 and to provide evidence for the benefit of the Court to assist in resolving the questions raised by the Application.
11. I have seen and read the Affidavit of John Park sworn and filed in this proceeding on 12 November 2018 ("**Mr Park's Affidavit**"), in support of the Application.
12. I have identified that there are a number of matters in Mr Park's Affidavit that invite a response, and I propose to do so in due course by way of a further, detailed Affidavit to be filed in accordance with directions to be sought from the Court at the directions hearing on 19 November 2018.
13. This Affidavit is intended to provide a preliminary, broad overview of certain aspects of the evidence that I propose to provide for the benefit of the Court in a further, detailed Affidavit to be provided to the Court.


**The proposed alternative regime**

14. I understand that Mr Park seeks by the Application to vary not only the scope of my appointment but also its terms, in particular as to my ability to recover my remuneration and expenses from the property of the FMIF.
15. I expect to be in a position to inform the Court at the hearing on 10 December 2018 whether or not I am able to provide my consent to continue to act in my appointments pursuant to such altered terms.
16. The reason why I am not able to do so now is that, in circumstances where the terms proposed involve BDO carrying very substantial expense and remuneration claims for an indefinite period of time, it is necessary for me to consult further with my partners at BDO before providing or otherwise withholding my consent.

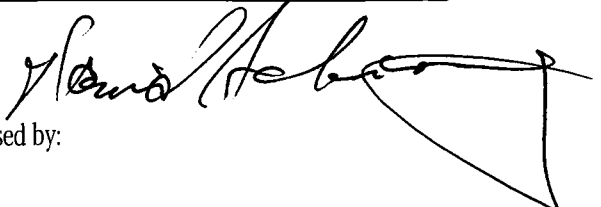
**Finalisation Strategy**

17. I understand that Mr Park's stated purpose in bringing the Application is to consider the most efficient way forward in respect of the winding up of the FMIF (along with the other related Funds).


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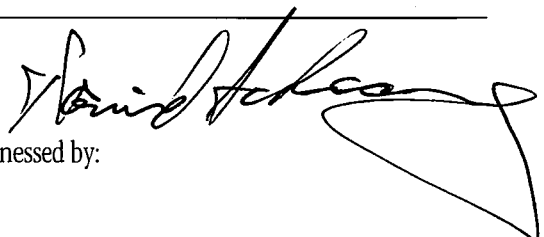
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18. Prior to the filing of the Application by Mr Park, I instructed my solicitors, Tucker & Cowen, to send correspondence dated 27 September 2018 to Mr Park's solicitors, Russells, setting out what I considered to be the most efficient way forward to finalise the winding up of the FMIF. A copy of that correspondence is set out at pages 3 to 9 of the Bundle.
19. As that correspondence set out, the main issues which remain in the winding up of the FMIF are the following:
- (a) Completing the proof of debt process, pursuant to the December 2015 Orders.
  - (b) Progressing litigation which I have caused to be brought in the name of LMIM as responsible entity of the FMIF, or have otherwise caused to be funded for the benefit of the FMIF.
  - (c) Distributing funds to the members of the FMIF.
  - (d) Compliance with any financial reporting and audit obligations, and seeking the extension of the current ASIC exemptions obtained on my application, should the current exemptions expire before the winding up is at the stage where the final audit should be undertaken.
  - (e) Maintaining LMIM's Australian Financial Services Licence.
  - (f) Maintaining the Register of members of the FMIF, and reporting quarterly to members;
  - (g) Dealing with any claims by Mr Park for remuneration, costs or expenses to be paid from the FMIF.
20. I am working to resolve the remaining issues in the winding up of the FMIF, as soon as is reasonably possible, and I will provide a more detailed account of the remaining issues in the winding up in the further, detailed Affidavit that I propose to provide to the Court.
21. **First**, as to the proof of debt process, I am dependent on Mr Park to adjudicate the proofs of debt, and to notify me of any indemnity claims which have been made under the December 2015 Orders.



Signed:

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Witnessed by:

22. I have not to date been provided with any recent estimate by Mr Park as to how long he expects to take adjudicating the proofs of debt (the deadline for lodgement of which was 2 October 2018), and to identify any indemnity claims against the FMIF under the December 2015 Orders.
23. I understand that Mr Park has an indemnity for his remuneration and expenses in performing that work where it is in connection with the FMIF, under the December 2015 Orders as varied by the orders made on 18 July 2018.
24. I instructed my solicitors, Tucker & Cowen, to send correspondence dated 15 November 2018 to Mr Park's solicitors, Russells, regarding this issue, as well as other issues. A copy of that correspondence is set out at pages **10 to 12** of the Bundle.
25. *Second*, as to the litigation which I have caused to be brought in the name of LMIM as responsible entity of the FMIF, a number of the more significant claims are at a particularly sensitive stage. I note in particular:

- (a) as to the proceedings against the managed investment schemes known as the 'Feeder Funds' (the **Feeder Fund Proceedings**), there are ongoing sensitive negotiations to settle those proceedings. The mediation which commenced on 5 and 6 November 2018 has been adjourned to 20 November 2018 to allow those negotiations to continue, in the event that the matter has not already settled by then.

In those proceedings, LMIM as RE of the FMIF seeks the reconstitution of the FMIF for loss and damage of \$55,059,318.12 plus interest suffered as a result of redemption payments made by LMIM without authority and in breach of trust;

- (b) as to the proceedings against the former auditors of the FMIF, the relief sought in those proceedings includes damages in excess of \$200 million (the **EY Proceedings**). Consequently, their outcome will have a very substantial impact on the amount of funds available for distribution to FMIF members.

An order has recently been made that a mediation take place by 15 March 2019. Although no defence has yet been filed by the auditors, I consider that the prospects of a mediated

settlement are reasonable, in circumstances where the evidence of key witnesses is already known following the extensive public examinations that I caused to be conducted over four weeks in 2015.

- (c) as to the proceedings against the directors of LMIM and KordaMentha as trustee of the Managed Performance Fund (MPF), being Supreme Court of Queensland Proceeding No 12317/14 (**Bellpac Proceedings**), that matter is likely to be ready for trial in the first half of next year.

26. For the avoidance of doubt, although the above are the most significant, they are not the only claims that I have caused to be brought in the name of LMIM as responsible entity of the FMIF that remain to be finalised and I have caused PTAL as custodian of the FMIF to fund certain investigations or recovery proceedings undertaken or brought by other insolvency practitioners, with the aim of recovering funds for the benefit of FMIF members .
27. In advance of the hearing listed for 10 December 2018, I will provide a more detailed summary of each claim that I have caused to be brought in the name of LMIM as responsible entity of the FMIF, and the other recovery proceedings or investigations that I have caused PTAL as custodian of the FMIF to fund, and the current state of the progress of each of those claims, for this Honourable Court.
28. *Third*, I intend to apply to Court for approval to make an interim distribution to members, as soon as possible.
29. Following the discontinuance earlier this year of proceedings in which substantial claims were made against assets of the FMIF by KordaMentha as Trustee of the MPF (Supreme Court of Queensland Proceedings 8032/14, 8034/14 and 12716/15), I have been in ongoing discussions with Mr Hayes and Mr Connelly ("**the DB Receivers**"), the Receivers and Managers appointed by Deutsche Bank, AG regarding their proposed retirement.
30. I remain optimistic that the DB Receivers will retire in the near future and have been diligently following them up in relation to this.

31. Otherwise, the remaining impediments, or potential impediments, to the making of an interim distribution (with the leave of the Court) are as follows:
- (a) finalisation of the proof of debt process;
  - (b) finalisation of the Feeder Fund Proceedings. However, in the event that those proceedings do not settle, I consider that it may still be possible to make an interim distribution to the other members of the FMIF;
  - (c) rectification of the register of members of the FMIF may be required, to correct errors in the records of the number of units held by foreign currency investors which were introduced into the register in 2010 when it was transferred by LMIM to a new database. The work required to identify those errors is ongoing and nearing completion, and I expect to be in a position to bring the necessary application by early 2019.
32. Subject to these matters, I am hopeful of making an application to the Court to make an interim distribution by early 2019.
33. Further evidence as to the work required to complete the winding up of the FMIF and my strategy for completing the winding up of the FMIF expeditiously and cost effectively, whilst at the same time achieving an optimal outcome for FMIF members, will be provided in the more detailed Affidavit I propose to provide to the Court in advance of the hearing on 10 December 2018.

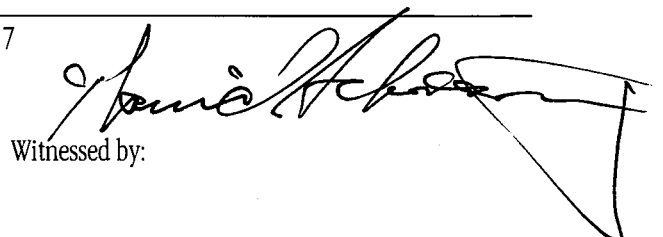
**Costs vs benefits analysis of the Application**

34. On the basis of my experience in relation to the winding up of the FMIF to date, and my knowledge of the current status of the winding up, it is my opinion that the orders sought by the Application will not result in any costs savings for FMIF members.
35. In my opinion, there are very likely to be significant costs associated with transferring responsibility for supervising the winding up of the FMIF from me, to the Liquidator.



Signed:

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Witnessed by:

36. The costs of Mr Park and his staff familiarising themselves with the relevant books and records of the FMIF as they now stand, and getting up to speed in relation to this complex winding up, would be significant.
37. That is not limited to my general responsibilities in managing the FMIF and the register of Units, but also in respect of the litigation which Mr Park proposes to take conduct of, such as the Bellpac Proceedings, which are at an advanced stage and likely to be ready for trial in the first half of next year.
38. As to the proposal to limit any claims for indemnity and remuneration to 50% of an advanced estimate, it is my opinion that this will be productive of a reduced recovery by the FMIF at least from the EY Proceedings.
39. That is because it may well become necessary for me to obtain litigation funding to progress the EY Proceedings, at a substantial cost to the FMIF.
40. I have previously considered the option of seeking litigation funding for the EY Proceedings, and to date have taken the view that the additional cost imposed by funders would not be justified in circumstances where there are funds available in the FMIF to meet the cost of the litigation itself.
41. However, I intend to seek judicial advice following the mediation that is now scheduled to occur by 15 March 2019 as to whether I am justified, in light of any offers of settlement which may have been made, in continuing to progress the EY Proceedings, with or without litigation funding.
42. I intend to provide further detail in relation to these matters in the more detailed Affidavit I propose to provide to the Court in advance of the hearing on 10 December 2018.

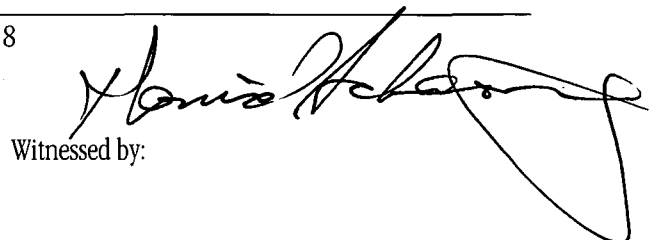
**The Liquidator's Remuneration and Expenses**

43. In his affidavit, Mr Park gives evidence about the level of scrutiny that I have given to his applications for approval of remuneration and expenses.
44. To take one example, Mr Park refers to my opposition to the Indemnity Application, that was resolved by the decision in *Park & Muller (liquidators of LM Investment Ltd) v Whyte (No 3)* [2017] QSC 230.

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Signed: 

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Witnessed by: 



45. That particular application was unusual, because my opposition to it included raising the clear accounts rule in response to a claim by LMIM pursuant to its indemnity as trustee.
46. I sought and received judicial advice from the Supreme Court of Queensland to confirm that I was justified in raising the clear accounts rule in response to that application, where the issue of the application of the clear accounts rule was of much broader significance in the winding up of the FMIF than the Indemnity Application alone.
47. I will provide evidence of the relevant circumstances of the matters referred to in paragraphs 68 to 73 of Mr Park's affidavit, in the more detailed Affidavit I propose to provide to the Court in advance of the hearing on 10 December 2018.

**The Liquidator's Application to be appointed contradictor in the Feeder Fund Proceedings and the Clear Accounts Proceeding**

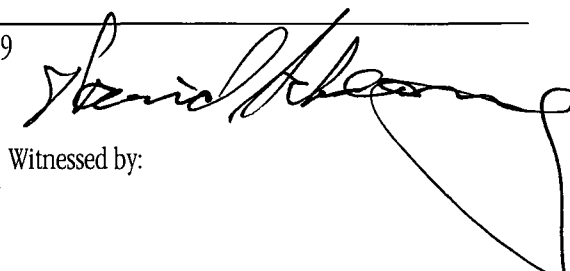
48. I understand that Mr Park seeks orders in the Application that he be appointed as a 'contradictor' in Supreme Court proceedings 11560 of 2016 (the **Clear Accounts Proceeding**), and in the Feeder Fund Proceedings.

Clear Accounts Proceeding

49. I caused the Clear Accounts Proceeding to be commenced in the name of LMIM as responsible entity of the FMIF to preserve claims for damages or equitable compensation suffered by the FMIF as a result of breaches of trust or duty by LMIM.
50. My purpose in bringing the Clear Accounts Proceeding was and remains to preserve a clear accounts rule defence to the indemnity that would otherwise be available to LMIM as trustee, in response to various claims that were on foot against the FMIF at the time the Clear Accounts Proceedings were commenced which sought to rely on that indemnity, and in due course in response to such Creditor Indemnity Claims as Mr Park may identify and notify to me as part of the proof of debt process.
51. Mr Park was appointed as the person to represent the interests of LMIM in its own right, pursuant to section 59 of the *Trusts Act 1973* (Qld), by the orders of the Honourable Justice Jackson made on 25 July 2018.

  
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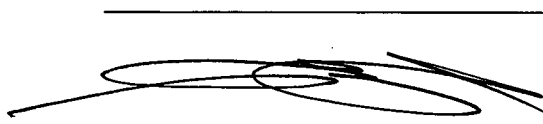
  
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52. The Clear Accounts Proceeding was stayed at that time, pending completion of the proof of debt process, and the identification of the creditors who will stand to benefit from any indemnity claims who might be called upon to fund a defence of the Clear Accounts Proceedings.
53. A copy of the orders made on 25 July 2018 is at pages 13 to 14 of the Bundle.
54. A copy of the Amended Claim and Statement of Claim in the Clear Accounts Proceeding is at pages 15 to 56 of the Bundle.

Feeder Fund Proceedings

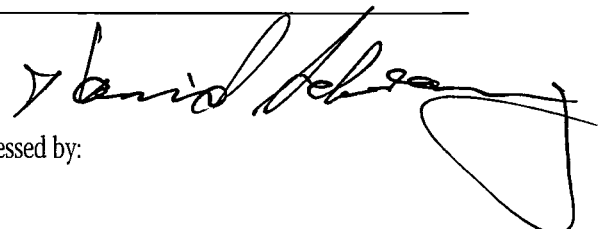
55. I caused the Feeder Fund Proceedings to be commenced to seek orders confirming whether the Feeder Funds were disentitled from receiving further distributions in the winding up of the FMIF, to the extent of the benefits previously provided to them from the FMIF in breach of trust (subject to any necessary adjustments), and to confirm whether a number of income distributions and deemed re-investments were void.
56. The key defendants to the Feeder Fund Proceedings are:
- (a) LMIM in its capacity as responsible entity of the LM Currency Protected Australian Income Fund (**CPAIF**);
  - (b) Trilogy Funds Management Limited in its capacity as responsible entity of the LM Wholesale First Mortgage Income Fund (**WFMIF**);
  - (c) LMIM in its capacity as RE of the LM Institutional Currency Protected Australian Income Fund (**ICPAIF**); and
  - (d) LMIM in its own right.
57. The key allegations against each of the defendants are, in most respects, materially identical.

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Signed:

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Witnessed by:

58. On 13 June 2018, his Honour Justice Jackson directed pursuant to section 59 of the *Trusts Act* 1973 (Qld) that:

- (a) Mr Said Jahani of Grant Thornton, the privately appointed receiver to the assets of the CPAIF and the ICPAIF, represent the interests of LMIM in its capacity as responsible entity of the CPAIF and the ICPAIF;
- (b) Mr Park represent the interests of LMIM in its own right.

59. A copy of the orders made on 13 June 2018 is at pages 57 to 62 of the Bundle.

60. I am aware from my involvement in the Feeder Fund Proceedings to date that the interests of the Feeder Funds are being actively and vigorously advanced by Mr Jahani and his solicitors (HWL Ebsworth) and counsel (Mr Dominic O'Sullivan QC with Mr David Turner), as well as by Trilogy and its solicitors (Squire Patton Boggs) and counsel (Ms Philippa Ahern).

61. A copy of the Second Further Amended Statement of Claim in the Feeder Fund Proceedings is at pages 63 to 95 of the Bundle.

Correspondence

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

63. A copy of Russells' letter to Tucker & Cowen dated 5 November 2018 is at pages 96 to 97 of the Bundle.

64. I instructed Tucker & Cowen to respond to that letter by letter dated 15 November 2018, a copy of which at pages 98 to 100 of the Bundle.

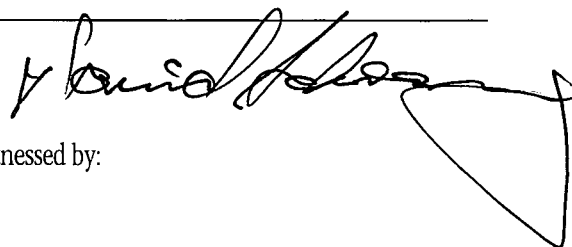
**Orders sought in relation to budgets**

65. In the Application, orders are sought to the effect that Mr Park and I each deliver a detailed Budget up to and including the payment of the final distribution to the members of the FMIF, to include further Budgets for a number of specific tasks.
66. There are obvious difficulties in providing such detailed or precise Budgets, particularly given that the principal tasks remaining in the winding up is the resolution or determining of the remaining legal proceedings on foot, and where the costs of the non-litigation aspects of the winding up are likely to be heavily impacted by the amount of time that is in fact required to resolve or have determined the remaining legal proceedings.
67. In my experience with conducting significant litigation, such as the EY Proceedings, there are a large number of variables and vicissitudes which can significantly affect the actual cost, and impact upon the timeframe.
68. I will, however, be in a position to provide (and I intend to provide in my Affidavit to be filed in advance of the hearing of the Application) a rough estimate of the costs and remuneration that I am likely to incur though to about mid-2019, on the assumption that both the Feeder Fund Proceedings and the EY Proceedings reach a mediated settlement, and that it is not ultimately necessary to prosecute the Clear Accounts Proceedings to a final resolution.
69. My estimate is likely to be subject to a number of qualifications, particularly as to the outcome of the proof of debt process, and as always there may be unforeseen variables which would affect the cost.
70. To provide the requested budgets, in my experience, could otherwise be an expensive exercise which would necessarily have to attempt to account for the numerous ways in which the winding up of the FMIF might unfold, but which is ultimately likely to be of relatively limited utility.
71. In my experience, the most significant factors in seeking to minimise the expense and delay in finalising a winding up are typically the competence and experience of the insolvency practitioners involved, and their familiarity with the relevant circumstances.



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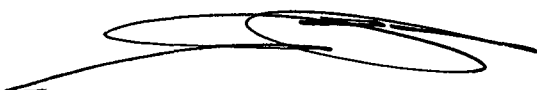
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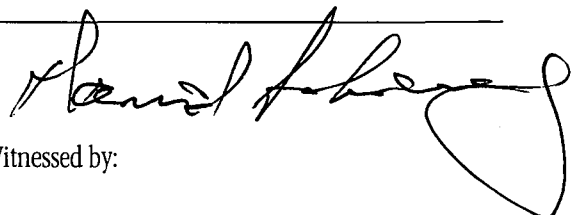
### Financial Reporting to FMIF Members

72. My expenses and remuneration are presently publicly available, as follows.
73. **First**, I cause half yearly and end-year financial statements for the FMIF to be prepared and uploaded to the website [www.lmfimif.com](http://www.lmfimif.com) (the **FMIF Website**).
74. **Second**, I cause quarterly reports of my receivership to be issued to members. Every second report must comply with the conditions of the relief granted by ASIC to the FMIF in relation to its financial reporting and audit obligations. At pages **101** to **102** of the Bundle is the most recent instrument of relief.
75. Specifically, in my reports to members, I update members as to the amount of remuneration incurred, since my previous application for approval of remuneration.
76. **Third**, the DB Receivers control the bank accounts of the FMIF, and prepare and lodge with ASIC statements of receipts and payments (ASIC Form 524's).
77. Details of all of the receipts and payments of the FMIF, including of the costs and expenses of the winding up, are detailed in these statements, which I cause to be uploaded to the FMIF Website.
78. **Fourth**, I also lodge statements of receipts and payments but, as I do not control the FMIF bank accounts, my statements of receipts and payments only contain limited information in relation to my remuneration and disbursements.
79. **Fifth**, I bring periodic applications to Court for approval of my remuneration, in the proceedings in which I was appointed. In support of each such application, I provide detailed evidence to the Court of the work for which I seek approval of my remuneration.
80. Both the Members of the FMIF and the Liquidator of LMIM are given notice of each application, as well as the supporting affidavits, which are uploaded to the FMIF Website.
81. On each occasion when I have sought approval of my remuneration, it has been approved in full.
82. My ninth application for approval of remuneration was heard by Justice Boddice on 21 June 2018.



Signed:

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Witnessed by:

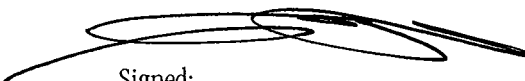
83. On that occasion, an executor of an estate of a member appeared to oppose orders for my remuneration, and sought orders that my remuneration should be deferred until the completion of the winding up, because “*there is little incentive for [the various legal proceedings] to be resolved in a timely way if the receiver continues to be able to be paid remuneration without any timeline being required in respect of the completion of those proceedings.*”
84. His Honour rejected that application and approved my remuneration in full, holding that “*It would be unfair to deny that professional remuneration at this time on the basis it should be deferred pending conclusion of those outstanding proceedings.*”
85. However his Honour relevantly commented as follows:

“Mr Maddrill’s concern, however, is a real and genuine concern, namely, that there is no timeline for the completion of the ongoing litigation. It is a matter that needs to be given consideration by the receiver in order to ensure there is some finite timeline, accepting, of course, that the receiver is but one party in that litigation.

On future applications for remuneration, it would be expected there would be a timeline in relation to those proceedings, particularly as they represent the remaining focus of the receiver’s work.”

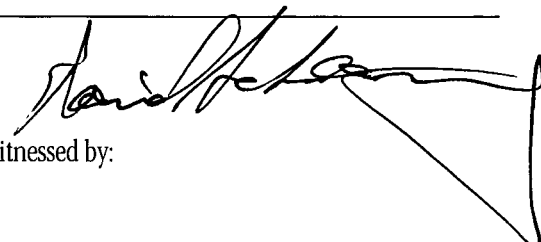
86. At pages **103** to **105** of the Bundle is a copy of the transcript of the ex tempore reasons for judgment of Justice Boddice dated 21 June 2018.
87. I have recently filed my tenth application for approval of remuneration, which is listed for hearing in the applications list on 29 November 2018.
88. On 13 November 2018, I swore an 82 page affidavit in support of my application for approval of remuneration. In that affidavit, I have endeavoured to satisfy Justice Boddice’s expectation that I provide a timeline for resolution of each proceeding in which I am engaged as the receiver of the

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Signed:

Page 14



Witnessed by:

FMIF. By way of example, I say regarding the EY Proceeding at paragraph 69 of that affidavit as follows:

“The parties have had recent discussions regarding undertaking an early mediation of the matter. I am informed by Mr Scott Couper of Gadens, my solicitor in the matter, and believe that he is presently discussing such a proposal with the solicitors for the defendants. If such a mediation were to take place, it would take place in the first quarter of 2019. If the matter does not proceed to mediation, or mediation is not successful, the matter is likely to take between 18 months and two years for the proceeding to be determined or resolved.”

89. As I say above, orders have since been made for a mediation of the EY Proceedings by 15 March 2019.
90. I will provide more detailed evidence of each of the proceedings in which I am engaged or are otherwise causing to be funded, in the more detailed Affidavit I propose to provide to the Court in advance of the hearing on 10 December 2018.

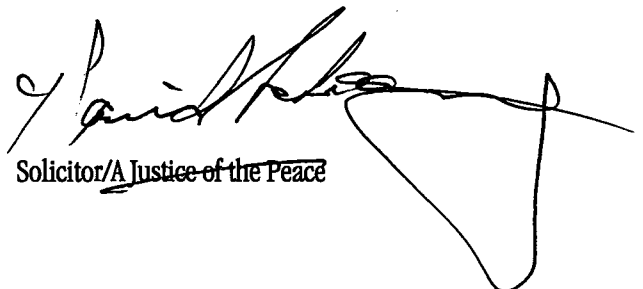
**Further correspondence in relation to Feeder Fund Proceeding**

91. At pages **106** to **108** of the Bundle is a copy of a letter from HWL Ebsworth to Russells dated 16 November 2018.
92. All the facts and circumstances above deposed to are within my own knowledge save such as are deposed to from information only and my means of knowledge and sources of information appear on the face of this my Affidavit.

Sworn by **DAVID WHYTE** on the 16<sup>th</sup> day of November 2018 at Brisbane in the presence of:



Deponent



Solicitor/A Justice of the Peace

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

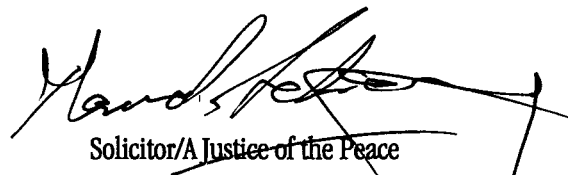
Respondent: DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288 PURSUANT TO SECTION 601NF OF THE CORPORATIONS ACT 2001

CERTIFICATE OF EXHIBIT

Exhibit "DW-125" to the Affidavit of DAVID WHYTE sworn this 16<sup>th</sup> day of November 2018



Deponent



Solicitor/A Justice of the Peace

CERTIFICATE OF EXHIBIT:  
Form 47, R.435

Filed on behalf of the Respondent

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**

**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**

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Melissa Nel

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**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**

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# Tucker&CowenSolicitors.

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Our reference: Mr Schwarz / Mr Nase

27 September 2018

Your reference: Mr Tiplady / Mr Walsh

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Brent Weston.  
Marcelle Webster.

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

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

1. Your client has foreshadowed an application for directions or orders concerning the future conduct of the winding up of the FMIF, having regard to the dual appointments of our respective clients.
2. We refer to our letter of 18 September 2018, and to your letter of 21 September 2018, received that evening, on this issue.
3. This letter responds to your letter's request that our client provide his views as to the current regime, and whether he considers it to be working optimally.
4. We note that we have not yet received any draft proposed application, nor been informed of the orders to be sought by the foreshadowed application, and this letter therefore assumes that any application to be made by your client will be in terms reflecting what was said by your client's Queen's Counsel in Court on 6 September 2018, as recited in our letter of 18 September 2018.

## Mr Whyte's approach

5. It is appropriate to begin by identifying the way in which our client intends to approach your client's foreshadowed application.
6. Mr Whyte does not consider it to be his role, as a Court-appointed receiver and 'responsible person' of the FMIF, to 'enter the fray' in seeking either to preserve the *status quo*, or to seek some significantly altered regime.
7. He considers that his role is to provide such assistance to the Court in connection with your client's foreshadowed application as is reasonably necessary to enable the Court to make a fully informed decision as to the most optimal way to conduct the balance of the winding up of the FMIF, in terms of attempting to minimise duplication of work and any scope for controversy as to the allocation of responsibilities.
8. We note in this regard that his Honour clearly indicated in the recent hearing that our client, and we, should give consideration to the way in which the 'dual appointments' in the winding up of the FMIF might be better streamlined.

9. Our client's participation in without prejudice discussions to date have been on that basis and pursuant to that invitation, as is this letter.
10. In short, Mr Whyte considers that he has no relevant personal interest in the outcome of the foreshadowed application by your client, however he will do what he considers appropriate to best assist the Court to consider and determine how the winding up of the FMIF may most appropriately be concluded.

Assessment of the current regime

11. Your letter frames your client's foreshadowed application as one for orders as to possible solutions to "problems currently being experienced" in relation to the dual appointments of your client and ours.
12. Your letter does not identify with any specificity what your client considers those problems to be. We would have thought that your client could articulate those clearly, given that this foreshadowed application has been your client's initiative.
13. Nonetheless, as we stated in our letter of 18 September 2018, our client is open to the idea that some variation to the current regime may be appropriate.
14. It may be accepted, we think, that there will inevitably be some level of additional cost involved in the existence of multiple layers of insolvency practitioner appointments.
15. That additional cost was found to be justified by Justice Dalton and the Court of Appeal, for the reasons set out in their respective judgments.
16. Presently, those layers comprise:
  - (a) your client's appointment as the liquidator of LMIM;
  - (b) our client's appointment as receiver of the scheme property of the FMIF and as the person responsible for ensuring the winding up of the FMIF in accordance with its Constitution; and
  - (c) the appointment by Deutsche Bank AG ("DB") pursuant to its security of McGrathNicol as receivers and managers ("DB Receivers") of the FMIF property.
17. While that is a necessary consequence of the regime ordered by the Court in August 2013, our client has endeavoured to keep the level of any additional costs resulting from these layered appointments to a minimum.
18. In relation to the DB Receivers, our client agrees that their appointment no longer serves any useful purpose.
19. To that end, we are instructed that our client has been negotiating for some time with DB and the DB Receivers to procure their retirement as receivers and managers, and that they have informed our client that their retirement as receivers and managers is imminent.
20. Once that retirement occurs, that will, to some extent, streamline the processes involved in the winding up of the FMIF.
21. As to the relationship between our respective clients, his Honour's judgment in [2015] QSC 283 (the "Residual Power's Judgment") and the Orders of 17 December 2015 ("December Orders") have provided considerable clarity

and guidance as to each of their roles and responsibilities, and has minimised overlap in the carrying out of the substantive tasks required in the conduct of the winding up.

22. Looking forward, and without purporting to be completely comprehensive, our client considers that the following significant tasks remain in the winding up of the FMIF:

(a) Completing the proof of debt process, pursuant to the December Orders.

We understand that your client has already called for proofs, and that the process envisaged by the December Orders is already well under way.

(b) Progressing litigation which Mr Whyte has caused to be brought in the name of LMIM as responsible entity of the FMIF.

Substantial work continues to be ongoing in this category, including (not exclusively) in connection with Supreme Court proceeding 12317/14 commenced against LMIM, the former directors of LMIM and KordaMentha as trustee for the MPF (the "Bellpac proceeding"), which it is anticipated will be heard in 2019, and Supreme Court proceeding 2166/15, commenced against the former auditors of the FMIF, Ernst & Young (the "EY Proceedings").

Mr Whyte intends to continue to explore all reasonable opportunities for settlement of these proceedings, but is cautious not to do so prematurely at the cost of a more profitable settlement or determination in due course.

(c) Distributing funds to the members of the FMIF.

Our client considers it to be desirable that there be a distribution to members, even an interim distribution, as soon as it is possible to do so.

Following the discontinuance of significant litigation against the FMIF earlier this year, making an interim distribution is now a reasonable possibility, subject to resolving the following three matters:

(i) *First*, the register of the members of the FMIF needs to be rectified, to correct errors in the records of the number of units held by foreign currency investors.

Those errors occurred in 2010 when the register was transferred to a new database.

The process of identifying those errors is already underway, and Mr Whyte will cause an appropriate application for rectification to be brought once that process has been completed.

(ii) *Second*, the proceedings which Mr Whyte has caused to be commenced against the Feeder Funds, being Supreme Court proceeding 13534/16 (the "Feeder Fund Proceedings"), needs to be resolved before any distributions can be made to the Feeder Funds, i.e. to LMIM as responsible entity of the CPAIF and the ICPAIF and Trilogy Funds Management Limited as the responsible entities of the WFMIF.

A mediation of the Feeder Fund Proceedings is scheduled to occur in early November 2018.

It may be possible to make an interim distribution to the other members of the FMIF, subject to resolution of the Feeder Fund Proceedings. This is something that our client is considering.

- (iii) *Third*, the Court must approve the making of any distribution, because Mr Whyte is directed by the December Orders not to make a distribution to the members without the authority of an order of the Court.

We anticipate that the Court would expect to be informed of what the liabilities of the FMIF are, prior to authorising an interim distribution from surplus funds. This would require completion of the process under the 17 December 2015 orders with respect your clients calling for and adjudicating upon proofs of debt in the liquidation of LMIM and notifying our client of any claims for indemnity from the FMIF with respect to such debts or claims, and for our client to adjudicate upon any such claims for indemnity from the FMIF. Our client considers that this process should be completed as soon as possible and that it ought not take long to complete.

- (d) Compliance with any financial reporting and audit obligations, and seeking the extension of the current ASIC exemptions obtained on the application of our client, should the current exemptions expire before the winding up is at the stage where the final audit should be undertaken.

Our client understands that the effect of the Residual Powers Judgment and the December Orders is that the audit is your client's responsibility if ASIC does not confer an exemption, and that he would assist your client as required. As you know, our client has been attending to the preparation of financial reports and provision of information to members of the FMIF in accordance with the ASIC exemptions (most recently pursuant to ASIC Instrument 18-0166).

- (e) Maintaining LMIM's Australian Financial Services Licence.

Our client understands this to be your client's responsibility, although our client expects that the costs incurred in discharging that responsibility would not be substantial.

- (f) Dealing with any claims for remuneration, costs or expenses of your client sought to be paid from the FMIF.

Our client has taken a position in relation to each such claim on behalf of and in the interests of the members of the FMIF, in circumstances where there would not otherwise have been a contradictor.

The additional costs associated with this process have, in our client's view, been necessitated by the positions taken by your client in relation to certain aspects of those claims.

They do not properly reflect a cost of the existence of multiple layers of insolvency practitioners. They are the cost of an independent contradictor maintaining reasonable and valuable positions on behalf of and for the benefit of the members of the FMIF.

Indeed, in relation to your client's application for indemnity heard in May 2017, our client sought and obtained judicial advice before continuing to the final hearing.



23. As is apparent from the above, Mr Whyte continues to be engaged in substantial and valuable work for the benefit of the members of the FMIF.
24. Certain responsibilities also remain with your client, including as set out above, and as further considered in the Residual Powers Judgment.

**Our client's proposal**

25. In the circumstances, our client considers that there may be merit in his being appointed as a special purpose Liquidator of LMIM, with responsibility for winding up the FMIF pursuant to its Constitution.
26. The orders appointing our client as special purpose Liquidator would need to clearly specify the things he is required or authorised to do (to the exclusion of your client) which would be limited to performing any functions, complying with any obligations, , or exercising any powers, as Liquidator of LMIM, in the name of or on behalf of LMIM in its capacity as responsible entity of the FMIF, or under the Constitution of the FMIF.
27. This would include, for the avoidance of doubt, attending to complying with the financial reporting and audit requirements on behalf of LMIM as responsible entity of the FMIF (when the ASIC exemption expires), and attending to distribution of FMIF property at the conclusion of the winding up.
28. However, our client's view is that this should explicitly exclude any work relating to the proof of debt process pursuant to paragraphs 4 to 7 and 9 of the December Orders, as that process is already underway by your client, and is governed by the December Orders in such a way as to minimise the potential for conflicts of interest.
29. In our client's view, this arrangement would preserve the substantial and valuable work in progress by Mr Whyte, and would allocate further responsibilities to Mr Whyte as the insolvency practitioner with the greater detailed knowledge of the affairs of the FMIF through the conduct of its winding up to date.
30. In relation to the principal points of contention between our respective clients in the winding up of the FMIF to date, relating to your client's claims for remuneration and expenses from property of the FMIF, our client also considers that there is scope to minimise such disputation in the future.
31. Our client suggests that one means by which this may be achieved is for the Court to approve the payment of an amount of your client's future remuneration directly from the FMIF in a fixed periodic sum, without the need for any application to the Court for approval.
32. Our client suggests that an appropriate sum might be \$5,000 per month, however he is open to your client's views on the matter. This would reflect the work that your client is required to undertake into the future to maintain LMIM's AFSL which (once the other funds under your client's control have been wound up) would be largely for the benefit of the FMIF. As noted above, our client does not anticipate that the costs involved in that work would be significant.
33. If the amount of remuneration sought by your client from the FMIF were to exceed that threshold, your client would, of course, be at liberty to bring any application to Court to seek approval for the payment of a higher amount of remuneration from the FMIF.
34. If this proposal is to be presented to the Court, its terms would need to be set out in more detail, in draft orders in due course.

35. We would be grateful if you would provide us with any comments that your clients may have, in relation to this proposal.

Response to questions in letter dated 21 September 2018

36. Your letter asks about our client's remuneration and legal costs, in relation to litigation conducted by Mr Whyte on behalf of the members of the FMIF.<sup>1</sup>
37. However, we understand that the purpose of your client's foreshadowed application is to reconsider the structure of the dual appointments of our respective clients.
38. As far as we and our client are able to discern, Mr Whyte's remuneration claims and expenses in the past, and any estimates of future remuneration and expenses, are simply not relevant to that issue.
39. That is particularly where it is not suggested, as we understand it, that any of the litigation conducted by Mr Whyte ought not to be conducted, or that it would be more efficiently conducted by someone else; no such suggestion has been made to us or to our client, and we would be surprised if it were to be suggested.
40. Our client will of course consider your questions again, if he receives a satisfactory explanation for how the information you have asked for is relevant to a problem perceived by your client in the conduct of the winding up of the FMIF by a dual administration.
41. We note, however, that insofar as your letter is directed to any aspect of the reasonableness of our client's remuneration for undertaking work in connection with the litigation in which he has been engaged in his capacity as receiver of the FMIF:-
- (a) Mr Whyte has provided substantial detail in relation to the work he has undertaken, in the affidavits that have been filed in support of his nine applications to date for approval and payment of remuneration;
  - (b) Your client (by your firm) has been served with those applications and supporting affidavits on each application (but we would be pleased to provide further copies should you wish); and
  - (c) On each application, Mr Whyte's claim for remuneration has been considered by the Court and, on each occasion, the Court has found Mr Whyte's remuneration to be reasonable and appropriate in all the circumstances; there has been no appeal from any of those Orders of the Court.
42. Otherwise, as to Mr Whyte's expenses to date, we observe that Mr Whyte has caused to be prepared half-yearly management accounts for the FMIF.
43. Beyond this material, which is all publicly available, our client does not consider that it is incumbent on him to respond to your questions, which appear to him to bear no relation to the application foreshadowed by your client.

Conclusion

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<sup>1</sup> You have asked about the legal costs incurred by Mr Whyte, specifically with our firm. Of course, you will be aware that Mr Whyte has retained Gadens Lawyers, as well as this firm, to provide legal advice in respect of various matters and to act for him.

44. We look forward to hearing from you in relation to the proposal outlined above and, in due course, to receiving any proposed application for our consideration.
45. We also ask that you give further consideration to the identification of the issues or problems that your client considers require the Court's further intervention, so that (if problems are identified beyond the broad issues outlined above) our client and we may give consideration to them. When deciding whether to bring such an application, your client ought to weigh up the costs of bringing such an application as against the costs savings expected to be achieved if the application is successful.
46. Please do not hesitate to contact us if you have any questions.

Yours faithfully



Alex Nase  
Tucker & Cowen

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Our reference: Mr Schwarz / Mr Nase

15 November 2018

Your reference: Mr Tiplady / Mr Walsh

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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.

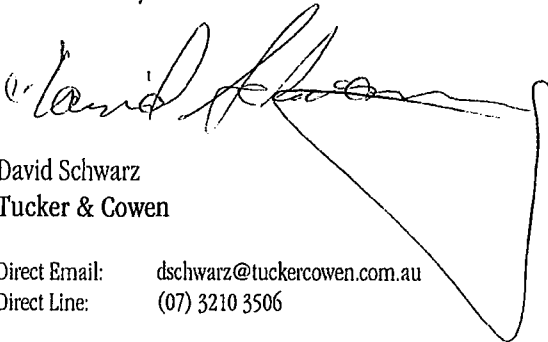
We are not aware that the position of LMIM in its own right has materially changed since 18 July 2018.

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.

**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

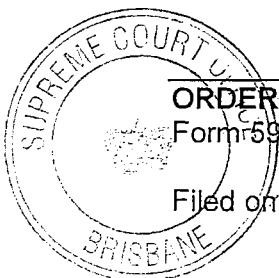
Before: Jackson J

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

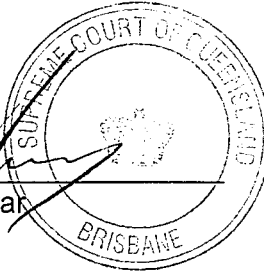
Filed on behalf of the Plaintiff

Tucker & Cowen Solicitors  
Level 15, 15 Adelaide Street  
Brisbane, Qld, 4000.  
Tele: (07) 3003 0000  
Fax: (07) 3003 0033

- (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: 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  
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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

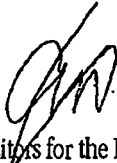
Telephone: (07) 300 300 00

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

Filed on behalf of the Plaintiff

113-7306-007.docx

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



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

#### LMIM – Other Roles

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

6. LMIM:-

- (a) was at all material times until 16 November 2012, the RE of the LM Wholesale First Mortgage Income Fund ARSN 099 857 511 ("WFMIF");
  - (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
- ~~(i)~~(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

~~30-32.~~ At all material times, LMIM was subject to the following duties as trustee, when managing the affairs of the FMIF:-

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

~~31-33.~~ 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 ~~prepaid~~ paid to LMA; from the ~~assets~~ property of the FMIF in anticipation and in advance of its liabilities from time to time to pay Service Fees or other fees or expenses.

**Particulars.**

The Plaintiff repeats the particulars in paragraph 42 above.

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

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

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

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

**Breach of Equitable and Statutory Duties**

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

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

(c) were not in the best interest of members of the FMIF; and

(d) were such as to prefer its own interest where that interest may have been in conflict with the interests of the members of the FMIF in preserving the property of the FMIF.

49. Further and in the alternative, a professional remunerated trustee 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 ~~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 4359, LMIM was aware, or ought reasonably to have been aware, of the matters set out in paragraphs 4157 and 4258 above.

Payments by MPF

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

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

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

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

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

Breach and loss

~~47.61. In the premises of the matters set out in paragraphs 4334, 59 and 4460 above, a professional remunerated trustee 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) atf the Jindabyne Unit Trust; Brambleton Pty Ltd; Bridgewater Lake Estate Ltd; Cameo Estates Lifestyle Villages (Launceston) Pty Ltd; Carrington Management Pty Ltd atf 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 atf the Northshore Bayview No 1 Unit Trust; OVST Pty Ltd; Redland Bay Leisure Life Pty Ltd; Redland Leisure Life Development Pty Ltd atf the Redland Bay Leisure Life Development Partnership; Madrers Properties Pty Ltd atf the Madrers 32-34 Marine Parade; Kingscliff Trust; Lea Developments Pty Ltd atf the JAL Trust and PWB Properties Pty Ltd atf the Brinsmead 32-34 Marine Parade; Kingscliff Trust; Source Developments No 1 Pty Ltd; Source Student Lodge Pty Ltd; St Crispin's Property Pty Ltd atf The St Crispin's Property Trust; Townsville Commercial Pty Ltd; U Own Storage (Southbank) Pty Ltd; Young Land Corporation Pty Ltd atf 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 less 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 forand if the benefit of each of the Feeder Funds-position is as alleged in paragraph 41(a) above. LMIM as trustee of the MPF made Feeder Fund Payments in the aggregate amount of \$10,431,836 (together with the payments referred to in paragraph 70 above, the "Feeder Fund Payments").

72. The Feeder Fund Payments were recorded by LMIM in the accounts of the FMIF as being in partial satisfaction of the KPG Consideration and the Lifestyle Consideration.

***Breach of Equitable and Statutory Duties***

~~73-107.~~ ~~If the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded~~If the position is as alleged in paragraph 72 above (which is not admitted), 41(a) above, in respect of each of the Feeder Fund Payments made from time to time:-

- (a) the payment was not made in satisfaction of any amount presently due and payable by LMIM as RE of the FMIF to the Feeder Fund in question; and
- (b) the payment was not otherwise authorised by or in accordance with the Constitution, ~~by the PDS, or by the Act.~~

~~74-108.~~ ~~In respect of each of the Feeder Fund Payments, if they had the effect ascribed to them in the accounts of the FMIF~~If the position is as pleaded~~alleged in paragraph 72 41(a) above (which is not admitted),~~ LMIM by making the payment:-

- (a) preferred the interests of the members of the Feeder Fund in question to the interests of the members of the FMIF; and
- (b) further and in the alternative, preferred its own interests as a member of the FMIF to the interests of the other members of the FMIF.

~~75-109.~~ ~~In the premises, if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF as pleaded~~position is as alleged in paragraph 72 41(a) above (which is not admitted), ~~the payment of the Feeder Fund Payments was a breach of,~~ LMIM breached:-

- (a) each of the Equitable Duties and;
- ~~(a)(b)~~ each of the Statutory Duties; and
- (c) its further duty under s.601FC(1)(d) of the Act to treat the members who hold interests of the same class equally and members who hold interests of different classes fairly.

***Loss***

~~76-110.~~ If the position is as alleged in paragraph 41(a) above, LMIM as RE of each of the Feeder Funds did not repay any of the Feeder Fund Payments to the FMIF.

~~77-111.~~ If LMIM had properly performed all of its duties as trustee and RE of the FMIF, and ~~if~~ the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF position is as pleaded~~alleged in paragraph 72 41(a) above (which is not admitted):-~~

- (a) LMIM would not have caused the amounts of each of the Feeder Fund Payments to be paid for the benefit of the Feeder Funds;

(b) the FMIF would have had the benefit of the amounts of each of the Feeder Fund Payments.

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

(a) ~~LMIM would have applied the amounts of the Feeder Fund Payments to reduce the debts of the FMIF from time to time; and~~

(b) ~~the FMIF would have avoided liability for interest to its financiers at the applicable rate from time to time on any such amounts.~~

79-112. In the premises, and if the Feeder Fund Payments had the effect ascribed to them in the accounts of the FMIF position is as pleaded ~~alleged~~ in paragraph 7241(a) above ~~(which is not admitted)~~, the FMIF suffered loss caused by LMIM's breaches of trust and contraventions of the Act as pleaded above.

#### Particulars

The loss suffered by the FMIF included:-

(a) The amount of approximately \$12,931,836, being the amount of the Feeder Fund Payments.

(b) Interest on that amount, at the ~~rates of interest~~ Pre-Judgment Interest Rate from time to time ~~set out in paragraph 19 above, or alternatively at such rate or rates as the Court considers appropriate.~~

The Plaintiff claims the following relief:-

1. A declaration that by:

(a) causing the ~~amounts to be paid in anticipation of the~~ RE Management Fee (as defined in paragraph ~~10(d)~~ 13(f) of the Statement of Claim) ~~to be paid at its direction, from the assets~~ property of the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF"), in advance of performing or causing to be performed the duties and obligations in respect of which the RE Management Fee was to be payable, ~~from the assets of the FMIF;~~

(b) causing further amounts to be paid at its direction, from the assets of the FMIF, in anticipation of LMIM becoming liable to LM Administration Pty Ltd ACN 055 691 426 ("LMA") for Service Fees in relation to the FMIF additional to the RE Management Fee;



- (c) further and in the alternative, causing the Service Fees and the Resources Fees (as defined in paragraphs ~~18(b)~~26(b), 27(c) and ~~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 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.

8.9. Interest pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld) at such rate and for such period as this Honourable Court deems fit.

9-10. Costs.

Signed:



Tucker & Cowen

Description: Solicitors for the Plaintiff

This pleading was settled by Mr Derrington of Queens Counsel with Mr Ananian-Cooper of Counsel.

The amendments to this pleading were settled by Mr McKenna of Queens Counsel with Mr Ananian-Cooper of Counsel.

#### NOTICE AS TO DEFENCE

Your defence must be attached to your notice of intention to defend.

**SUPREME COURT OF QUEENSLAND**

REGISTRY: BRISBANE  
NUMBER: 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

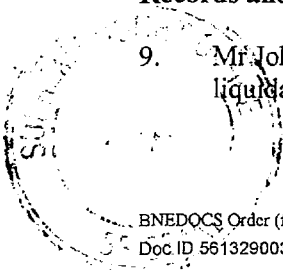
GADENS LAWYERS  
Level 11, 111 Eagle Street  
BRISBANE QLD 4000  
Tel No.: 07 3231 1666  
Fax No: 07 3229 5850  
JSO/SZC:201619858

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,

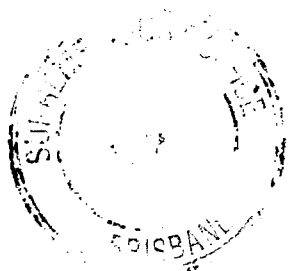
and the Plaintiff will pay Mr Park's reasonable costs of providing the documents and records referred to above.

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**

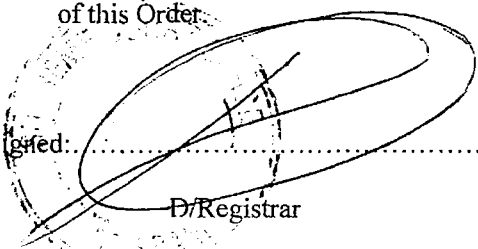
- 16. The parties, except for the fourth and fifth defendants, are directed to attend, participate in, and act reasonably and genuinely in, a mediation on a date to be agreed by the participating parties and the mediator, to be completed by 28 September 2018.
- 17. The mediator is to be selected by the 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.lmfimif.com](http://www.lmfimif.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.



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: *Giadens*

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  
Level 11, 111 Eagle Street  
BRISBANE QLD 4000  
Phone No: 07 3231 1666  
Fax No: 07 3229 5850  
SZC/JSO: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 ~~M~~members 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 2345 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 Register~~register 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 ~~4561~~ and ~~8367~~ 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~~4~~ 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~~8~~ and 856~~9~~ 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~~3 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~~4~~ 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~~3 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~~3 of the Statement of Claim in relation thereto;

- (b) is entitled to withhold from distributions or payments in relation to the WFMIF Unit~~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 ~~5644~~ 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)~~<sup>54(b)</sup> 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:

*Aadens.*

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.

# RUSSELLS

5 November 2018

Our Ref: AJT:JTW:20180543

Your Ref: Mr Schwarz and Mr Nase

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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 16 October 2018 letter in respect of paragraph 1(a) of our client's 10 October 2018 Application.

You have sought an explanation regarding paragraph 1(a) of the Application being a direction that the liquidator act as contradictor in respect of the Clear Accounts Proceeding and the Feeder Fund Proceeding.

**Feeder Fund Proceeding**

The reason for seeking the contradictor order in respect of the Feeder Fund Proceeding is that our client is the appropriate person to represent the interests of the members of the Feeder Funds. The order made on 13 June 2018 was that the interests of LMIM as responsible entity of the Feeder Funds be represented by Mr Jahani of Grant Thornton. It was not ordered that Mr Jahani specifically represent the interests of members of those Feeder Funds. Mr Jahani is representing a secured creditor and he was appointed pursuant to section 59 of the *Trusts Act 1973* (Qld) being in respect of a trustee suing himself or herself in a different capacity. Mr Jahani is therefore not representing the members of the Feeder Funds. Subject to our client having sufficient funding he is best placed to represent the interests of the members of the Feeder Funds in the Feeder Fund Proceeding.

You have asked whether our client is seeking to be indemnified out of FMIF scheme property for his costs including claims made in the Feeder Fund Proceeding and the Clear Accounts Proceeding. If directions are made that our client act as contradictor for the benefit of the class B unit holders it is appropriate that funds in respect of those members held in the FMIF be used to meet our client's remuneration and expenses in respect of the Feeder Fund Proceeding.

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The Feeder Fund Proceeding is in respect of class B unit holders in the FMIF who hold approximately 47% of the total number of issued units in the FMIF. Our client is concerned about a possible conflict of interest regarding the use of funds from the FMIF in respect of the Feeder Fund Proceeding as it is highly likely that your client is using class B unit holders funds to meet remuneration and expenses in respect of the Feeder Fund Proceeding. If this is the case, then the funds of the class B unit holders are being used to pay for litigation against them.

It is therefore appropriate that all of the costs of representing members of the FMIF are paid from property of the FMIF rather than just the costs of your client.

### **Clear Accounts Proceeding**

As previously stated, LMIM is in its own right is without funds and has not in the past been in a position to act as a contradictor in respect of the Clear Accounts Proceeding. If orders are made in accordance with the 10 October 2018 Application, then our client will be able to act as contradictor on any further hearings in respect of the Clear Accounts Proceeding and also attempt to resolve that proceeding in negotiations with your client.

Our client needs to act as contradictor in respect of the Clear Accounts Proceeding as the proceeding directly affects LMIM's right of indemnity in respect of the assets of the FMIF. In *Park & Muller (Liquidators of LM Investment Management Limited) v Whyte No 3* [2017] QSC 230 the Honourable Justice Jackson held that the Clear Accounts Rule operated to "suspend" LMIM's claimed right for payment from the assets of the FMIF until the resolution of that claim and that, in effect, the claim should not be finally resolved until the claim in the Clear Accounts Proceeding is finalised.

Although the Clear Accounts Proceeding has been stayed, there is a clear need for that proceeding to be resolved so that the liquidation of LMIM can be concluded.

Please tell us as soon as possible whether your client objects to our client acting as contradictor in respect of the Feeder Fund Proceeding and the Clear Accounts Proceeding in accordance with the orders sought in the Application and, if so, on what basis.

Might we please have your response by 4:00pm (Qld time) on Monday, 12 November 2018.

Yours faithfully



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Our reference: Mr Schwarz / Mr Nase

15 November 2018

Your reference: Mr Tiplady / Mr Walsh

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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 our letter of 16 October 2018, and to your letter in response dated 5 November 2018, in relation to the directions sought at paragraph 1(a) of the application by Mr Park filed 10 October 2018 ("the Application"), that your client, Mr Park, be appointed to act as a contradictor in the Feeder Fund Proceeding and the Clear Accounts Proceeding.

In our letter of 16 October 2018, we relevantly noted that:-

- Orders had been made in the Feeder Fund Proceeding to the effect that the interests of LMIM as RE of the CPAIF and ICPAIF be represented by Mr Jahani of Grant Thornton, and that the interests of LMIM in its own capacity be represented by Mr Park; and
- Orders had been made in the Clear Accounts Proceeding to the effect that Mr Park represent the interests of LMIM in its capacity as Defendant.

In the light of those orders, which were made on notice to your client and with your client's express consent, we then enquired as to what was meant by paragraph 1(a) of the Application.

## Feeder Fund Proceeding

Your letter of 5 November 2018 suggests that, in respect of the Feeder Fund Proceeding, your client seeks an order that he be appointed to represent the interests of the members of the Feeder Funds in the Feeder Fund Proceeding, and that his costs of doing so be paid from the property of the FMIF. Your letter does not refer to any rule of law or statute that would justify such an order, and we invite you to explain to us the legal foundation upon which your client relies.

*First*, as to the question of costs, our client's present view is that, even if the Court does consider it to be appropriate for there to be an additional contradictor to the Feeder Fund Proceedings, then having regard to the principles identified in cases such as *Park & Muller (liquidators of LM Investment Management Ltd) v Whyte* [2015] QSC 287, there is no proper basis for your client's costs of acting as contradictor to be paid out of the FMIF.

That is because it does not seem to our client that the work to be done by such an additional contradictor would be for the benefit of the members of the FMIF.

*Second*, as to the basis for your client's application, we acknowledge that a copy of an affidavit of Mr Park in support of the Application was delivered to our office late on 12 November 2018. Our client, and we, are still considering what is said in that affidavit.

We observe, however, that the affidavit does not appear to go into any great detail as to the grounds relied upon by your client in seeking orders that your client act as contradictor to the Feeder Fund Proceeding and the Clear Accounts Proceeding, but we are nonetheless giving further consideration to that affidavit.

That said, our client's initial inclination is that such directions are not necessary or appropriate.

It seems to our client that the interests of LMIM as RE of the CPAIF and of the ICPAIF are more than adequately represented by Mr Jahani. We do not understand you to suggest otherwise.

Insofar as the members of the Feeder Funds themselves have separate interests to be protected in the Feeder Fund Proceedings, neither we nor our client are aware of any member of the CPAIF or the ICPAIF approaching the Court, or the legal representatives of Mr Jahani, to express any concern about the adequacy of their representation in the Feeder Fund Proceedings.<sup>1</sup> Mr Park's affidavit does not refer to his knowledge of the existence of any such concerns by any of the members.

In addition, we note that the interests of the Defendants generally in the Feeder Fund Proceedings are also represented by the responsible entity of the WMIF, and their legal representatives.

For all these reasons, it seems to our client that the effect of the directions sought by your client in paragraph 1(a) of the Application would be to add a *third* contradictor into the Feeder Fund Proceedings in the absence of any apparent need justifying the cost of such an additional layer of representation.

It would not be to save costs to members of the FMIF but, rather, to promote further litigation between our respective clients, at the expense of FMIF members.

*Third*, we are instructed that there are ongoing settlement negotiations in relation to the Feeder Fund Proceeding.

The parties were represented at mediation in accordance with the representation Orders made on 13 June 2018, and the parties continue to rely upon those orders.

The continuing negotiations of the Feeder Fund Proceeding are at a sensitive stage and the timing of your client's application is regrettable, having the real potential to adversely affect those negotiations.

### **Clear Accounts Proceeding**

As regards the Clear Accounts Proceeding, it is said that your client "*needs to act as contradictor in respect of the Clear Accounts Proceeding as the proceeding directly affects LMIM's right of indemnity in respect of the assets of the FMIF.*"

However, your client, Mr Park, is already the person appointed to represent the interests of LMIM in its own right, as the defendant in the proceeding, pursuant to the orders made on 25 July 2018.

Your letter is then silent as to whether your client intends to seek indemnity out of the FMIF with respect to his costs of defending the claims made in the Clear Accounts Proceeding.

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<sup>1</sup> As you know, the members of the CPAIF and the ICPAIF were notified of the Feeder Fund Proceeding, and given an opportunity to approach the Court for leave to participate in the mediation that commenced on 5 November 2018, or to be joined.

As you know, the claims made in the Clear Accounts Proceeding are presently stayed, and the extent to which it is necessary for our client to proceed with the claims made in that proceeding will not be known until after the proof of debt process has been completed.

Once the proof of debt process has been completed, and any potential indemnity claims against the FMIF identified to our client, the Court will be in position to determine how the Clear Accounts Proceeding ought to be resolved.

At that stage, it seems to our client that the natural person or persons to fund the defence of the Clear Accounts Proceedings would be the person or persons who are to benefit, namely the creditors who have lodged proofs of debt that require that the Clear Accounts Proceeding to be determined. It does not seem to our client that it would be appropriate for those costs to be borne pre-emptively by the FMIF, consistently with the decision in *Frost v Bovaird* (2014) 223 FCR 275.

In any event, any further direction or order lifting the stay of the Clear Accounts Proceeding, including any direction as to the role of your client in that proceeding, is currently premature and potentially without utility.

#### **Directions hearing on 19 November 2018**

The Application was contemplated by the Order of Jackson J made in this proceeding on 3 October 2018. Paragraph 1 of that Order provides for the Application to be returnable for directions at 9.30am on 19 November 2018.


The Application, however, seeks substantive relief by paragraph 1(a), and we note that paragraph 1 is prefaced by the words, "*At the directions hearing on 19 November 2018.*"

We do not think it was intended by the Order made on 3 October 2018, that your client would seek any substantive relief on Monday, 19 November 2018, and we are not aware of any particular urgency that would require your client to seek orders in terms of paragraph 1(a) at the directions hearing on Monday, rather than at the hearing presently proposed to take place on 10 December 2018.

Given that the balance of the directions sought by paragraph 1 contemplate (for example) directions as to the filing of affidavit material in preparation for a hearing of the application, we query whether your client intends to seek orders in terms of paragraph 1(a), at the directions hearing.

Please tell us as soon as possible by return whether your client does intend to seek the relief identified in paragraph 1(a) as to the appointment of your client as contradictor, at the hearing on 19 November 2018.

Yours faithfully

  
David Schwarz  
Tucker & Cowen

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

**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.



Signed by Andrew Duffy

as a delegate of the Australian Securities and Investments Commission



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**TRANSCRIPT OF PROCEEDINGS**

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**SUPREME COURT OF QUEENSLAND**

**CIVIL JURISDICTION**

**BODDICE J**

**No 3383 of 2013**

**RAYMOND EDWARD BRUCE  
and ANOTHER**

**Applicants**

**and**

**LM INVESTMENT MANAGEMENT  
LIMITED and OTHERS**

**Respondents**

**BRISBANE**

**11.58 AM, THURSDAY, 21 JUNE 2018**

**JUDGMENT**

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: David White makes application for an order approving remuneration for work he has undertaken pursuant to his appointment by the Court as receiver of a fund known as the LM First Mortgage Income Fund. The application is made in circumstances where there have been numerous orders in the past approving remuneration for that receiver. Those previous orders have approved remuneration in the order of \$10 million.

Mr Maddrill, who appears as executor for the estate of the late Robert Arthur Coggle Maddrill, opposes the order for remuneration being made on the basis that the order should be deferred until the completion of remaining Court proceedings. Essentially, Mr Maddrill contends there is little incentive for those proceedings to be resolved in a timely way if the receiver continues to be able to be paid remuneration without any timeline being required in respect of the completion of those proceedings.

The receivership is a very complex receivership. It involves multiple entities in relation to various assets that were held. The primary assets were aged-care facilities in various locations. In addition, there are a number of legal proceedings which have been instituted in order to recover funds, which will be, ultimately, for the benefit of members of that fund should those proceedings be successful. It is in that context that the significant remuneration payments have been made in the past and approval is sought for further remuneration today.

It is a matter of concern that the receivership has now been going for a number of years. However, consideration must be given to the context of the receivership. Importantly, the receivership is now at the point where, essentially, all of the real assets have been realised. The remaining work, essentially, relates to outstanding legal proceedings.

If those legal proceedings are successful, there will be substantial funds that potentially will be recovered for the benefit of members of the fund. There have also been proceedings brought against the fund. The receiver is resolving those proceedings. One has recently been resolved, which will be for the benefit of members of the fund.

The receiver has set out the basis upon which the remuneration is claimed. It is correct the remuneration claimed is less than has been the case for corresponding periods in the past. That would be consistent with a reduction in the nature and extent of work required as assets have been realised in respect of the receivership.

Mr Maddrill's concern, however, is a real and genuine concern, namely, that there is no timeline for the completion of the ongoing litigation. It is a matter that needs to be given consideration by the receiver in order to ensure there is some finite timeline, accepting, of course, that the receiver is but one party in that litigation.

On future applications for remuneration, it would be expected there would be a timeline in relation to those proceedings, particularly as they represent the remaining focus of the receiver's work.

5 Notwithstanding the concerns expressed by Mr Maddrill, I am satisfied it is appropriate to fix the remuneration for the work that has been undertaken by the receiver for the period 1 November 2017 to 30 April 2018. The receivership is occurring in the context of a professional undertaking significant work which, to date, has been for the benefit of members of the fund. It would be unfair to deny that professional remuneration at this time on the basis it should be deferred pending conclusion of those outstanding proceedings.

10 It may not, of course, be the course the Court would take in the future if there is no timeline provided in relation to those proceedings which indicate a realistic resolution of those matters.

15 The material sets out the work that was undertaken. I am satisfied that is work that was required to be undertaken. Whilst it involved different teams undertaking different work, that must be viewed in the context of the complexity of the nature of the receivership and, in particular, the number and nature of the legal proceedings.

20 The remuneration is sought, essentially, on a time-costing basis. I am satisfied that it is appropriate, particularly having regard to the remuneration in the past, which has been the subject of approval by various judges of this Court.

25 I am satisfied the remuneration claimed is for work that was undertaken in relation to the receivership. I am satisfied it was work that was undertaken on a reasonable basis and undertaken by persons of the required magnitude. I accept there has been no unreasonable misuse of funds in relation to the work that was undertaken in order to achieve that remuneration.

30 I make orders in terms of the draft, which I initial and place with the papers. I have changed the name of the judge on the front of it to reflect the fact that I have heard it rather than Justice Atkinson.

Our Ref: DOF:ECS:683682

16 November 2018

Ashley Tiplady and Julian Walsh  
Russells Law  
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Brisbane QLD 4000

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Dear Colleagues

**LMIM as responsible entity of the LM First Mortgage Income Fund (FMIF)**  
**LMIM as responsible entity of the LM Currency Protected Australian Income Fund (Receiver and Manager Appointed) (CPAIF)**  
**LMIM as responsible entity of the LM Institutional Currency Protected Australian Income Fund (Receiver and Manager Appointed) (ICPAIF)**  
**Supreme Court of Queensland Proceeding Number 13534 of 2016 (Proceeding)**

We refer to Supreme Court of Queensland proceeding BS3508 of 2015, in which an application by your client is returnable before the Court on Monday, 19 November 2018 (**Liquidator's Proceeding**).

**1. Application in Liquidator's Proceeding**

- 1.1 By his application in the Liquidator's Proceeding, your client seeks a range of directions, including, by sub-paragraph 1(a), a direction that subject to certain costs orders sought in his favour, your client "*be directed to act as contradictor*" in respect of (relevantly) Supreme Court of Queensland proceeding 13534 of 2016 (**Feeder Funds Proceeding**).
- 1.2 The purpose of this letter is to notify you that our client considers that your client ought undertake not to press for the direction referred to at paragraph 2 above at the hearing on 19 November 2018, as it is an application properly to be made in the Feeder Funds Proceeding and not the Liquidator's Proceeding, and any application in the Feeder Funds Proceeding ought be filed and served on the parties in that proceeding in an orderly manner in accordance with the UCPR.

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## **2. Background**

- 2.1 On 13 June 2018, the Court made representation orders in the Feeder Funds Proceeding. We **enclose** a copy of the orders. The Court relevantly directed that:
- (a) the interests of LMIM in its capacity as responsible entity of the Feeder Funds as first defendant and third defendant be represented in the Feeder Funds Proceeding by our client in his capacity as receiver and manager of LMIM in its capacity as responsible entity of the Feeder Funds (sub-paragraph 3(b) and (c)); and
  - (b) the interests of LMIM in its own capacity as fourth defendant be represented by your client in his capacity as the liquidator of LMIM (sub-paragraph 3(d)).
- 2.2 Your client was served with the application giving rise to these orders, and consented to the order at (b) above.
- 2.3 The orders made on 13 June 2018 further provide for the production of documents in aid of a mediation (paragraphs 9 to 11); for notifications to be given to the members of the Feeder Funds (paragraphs 12 to 15); and for a mediation to be completed by 28 September 2018 (paragraphs 16 to 23). The date of the mediation was varied by subsequent order of the Court providing for the mediation to be held on 5 and 6 November 2018.
- 2.4 The mediation was held on 5 and 6 November 2018. The dispute was not resolved by the end of the mediation. With the consent of the mediator, the parties agreed to adjourn the mediation while settlement discussions continued. The mediation has been adjourned to Tuesday, 20 November 2018, being the day after your client's application is to be heard in the Liquidator's Proceeding.
- 2.5 In the meantime, on 10 October 2018, your client filed his application in the Liquidator's Proceeding.
- 2.6 The first notice we received of it was by your letter dated 6 November 2018 (being the second day of the mediation). Our client was not served with it. We recently downloaded it from the Queensland Courts website, together with the supporting affidavit of your client sworn on 12 November 2018.

## **3. The Feeder Funds Proceeding**

- 3.1 The directions sought by your client in the Liquidator's Proceeding referred to at paragraph 1.1 above appear to be directed at displacing or modifying the representation orders in the Feeder Funds Proceeding referred to at paragraph 5 above. That said, we are unsure of the intended legal and practical effect of a direction that your client "*be directed to act as contradictor*" in respect of the Feeder Funds Proceeding, in the context of the existing representation orders. The affidavit of your client sworn on 12 November 2018 does not assist to elucidate the intended legal and practical effect of the direction. We would be grateful if you could explain it to us.
- 3.2 As you know, since 13 June 2018, our client has proceeded to prepare for and attend a mediation and participate in settlement discussions in respect of the Feeder Funds Proceeding, at significant expense to his appointor, on the basis of the representation

orders made on 13 June 2018 with your client's consent. Our client intends to continue to pursue those discussions on the basis of the representation orders, in accordance with what he considers to be his duty to do so.

3.3 We would be grateful if you could also explain to us why your client:

- (a) seeks the orders the subject of the application in the Liquidator's Proceeding, given he consented to the orders of 13 June 2018 and as a result of which significant expense has been incurred; and
- (b) why your client filed his application on 10 October 2018 but did not notify our client of it until your letter dated 6 November 2018.

3.4 Please let us know whether your client will undertake not to press for the relief referred to at paragraph 2 above at the hearing of his application in the Liquidator's Proceeding on 19 November 2018.

Yours sincerely



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