

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: of 2015

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

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

AND

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

AND

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

STEPHEN CHARLES RUSSELL of Level, 18, 300 Queen Street , Brisbane, Solicitor states on oath:-

1. I am a solicitor of this Honourable Court and the Managing Partner of Russells, solicitors for the Applicants.

PAGE 1

Signed

Solicitor/Barrister/Justice of the Peace

AFFIDAVIT OF STEPHEN CHARLES RUSSELL

Filed on behalf of the Applicants

Form 46 Rule 431

Russells
Level 18
300 Queen Street
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2. Now produced and shown to me and marked "SCR-1" is an indexed, paginated bundle of documents to which I shall refer in this affidavit. References to page numbers in square brackets are references to the page numbers of SCR-1.

3. In addition to having the carriage of this matter, I was also responsible for the primary conduct of the proceeding numbered 3383 of 2013 in this Honourable Court which resulted in the judgment of Justice Dalton in *Bruce and Anor v LM Investment Management Limited and Ors* (2013) 94 ACSR 684; [2013] QSC 192.

4. On 21 August, 2013, I instructed Mr Cooper of counsel for the company, LMIM, when Dalton J heard the parties on the question of what orders ought to be made following publication of her reasons, delivered on 8 August, 2013. Drafts had been exchanged among the parties. Mr Tucker, solicitor, appeared for Mr Shotton, the Third Respondent. He handed up a draft order, a copy (with handwritten annotations) of which appears at [1] to [6] of my exhibit.

5. A copy of the transcript of the argument before Justice Dalton on 21 August, 2013 is at [7] to [24] of my exhibits.

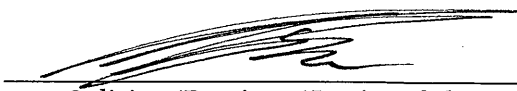
6. Prior to the hearing that day, the parties had agreed to submit a single draft order to Her Honour for argument, though not all of the orders to be made were agreed. In particular, ASIC and Mr Shotton sought orders to the following effect:-

- (a) *"Without derogating in any way from in any way [sic] the Appointment or the Receiver's powers pursuant to these Orders, Mr Whyte is authorised to ... perform each of the duties set out in clause 18.4 of the FMIF Constitution;"* and
- (b) *"Pursuant to section 601NF(2) of the Act, in the winding up of FMIF, the obligations of the Receiver pursuant to paragraphs 1 to 8 above exclude and replace any*

PAGE 2



Signed



Solicitor/Barrister/Justice of the Peace

obligation of the First Respondent arising by reason of paragraph 1 hereof and 601NE(1) of the Act, or either of them, save for an obligation to co-operate with the Receiver in the performance of his duties and obligations."

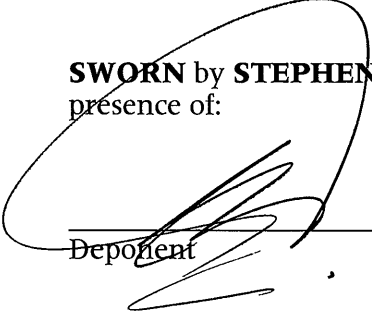
7. Neither order was made by Her Honour. There was no appeal from that decision by any party, nor was there any cross-appeal in the appeal from Justice Dalton's decision brought by clients in Court of Appeal proceeding number 8895 of 2013 in relation to that decision.

8. On 12 August, 2013, I attended a meeting which was attended by Ms Muller, Ms Kelly Trenfield of FTI Consulting, representatives of McGrath Nichol, Mr David Clout, the liquidator of LM Administration Pty Ltd (in liq), Mr Whyte and Mr Tucker (who by that stage, had obtained instructions to act for Mr Whyte) at the offices of FTI Consulting. Other people were also present at that meeting.


9. During the course of that meeting, Mr Whyte said words to the effect that the conduct of the winding up of the FMIF, "*...would be just like Equititrust. I hold all the money until the end; there will be no interim distributions.*"

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

SWORN by **STEPHEN CHARLES RUSSELL** on 20 March, 2015 at Brisbane in the presence of:



Depoent



Solicitor/Barrister/Justice of the Peace

SEAN CHARLES RUSSELL

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: of 2015

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

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

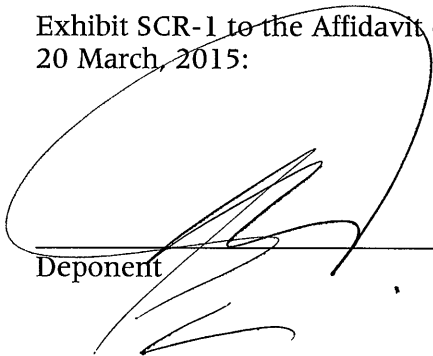
AND

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

AND

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

Exhibit SCR-1 to the Affidavit of **STEPHEN CHARLES RUSSELL** sworn 20 March, 2015:


Deponent


Solicitor/Barrister/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicants

Form 47 Rule 435

Russells

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SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: of 2015

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

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INDEX TO EXHIBIT

Description	Date	Page No(s)
Draft Order in proceeding number 3383 of 2013	21.08.2013	1 – 6
Transcript of proceeding number 3383 of 2013 on 21 August, 2013 before Dalton J	21.08.2013	7 – 24

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

Applicants: RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE

AND

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

AND

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

AND

Third Respondent: ROGER SHOTTON

AND

Intervener: AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION

ORDER

Before: Justice Dalton

Date: August, 2013

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

THE ORDER OF THE COURT IS THAT:

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

ORDER
Form 59 R.661

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

Filed on behalf of the Third Respondent

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

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- (i) providing a response as appropriate to matters raised by receivers of property of LMIM as Responsible Entity of the FMIF to which receivers have been appointed;
 - (ii) dealing with any creditors with security over the property of the FMIF including in order to obtain releases of security as is necessary to ensure the completion of the sale of property;
 - (iv) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (v) executing contracts, transfers, releases, or any such other documents as are required to carry out any of the above; and
- (b) bring, defend or maintain any proceedings on behalf of FMIF in the name of LM Investment Management Limited (Administrators Appointed) ACN 077 208 461 as is necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, including the execution of any documents as required and providing instructions to solicitors in respect of all matters in relation to the conduct of such proceedings including, if appropriate, instructions in relation to the settlement of those actions; and

~~performance of the duties set out in clause 18.4 of the FMIF constitution.~~

8.9. The First Respondent must, within 2 business days of the date of this Order:

- (a) send an email to all known email addresses held by the First Respondent for Members of the FMIF notifying of Mr Whyte's appointment, and a copy of this Order; and
- (b) make a copy of this order available, in PDF form, on:
 - (i) its website www.lmaustralia.com, together with a link to the www.bdo.com.au website;
 - (ii) its website www.lminvestmentadministration.com, together with a link to the www.bdo.com.au website.

9.10. Pursuant to section 601NF(2) of the Act, in the winding up of FMIF, the obligations of the Receiver pursuant to paragraphs 1 to 8 above exclude and replace any obligation of the First Respondent arising by reason of paragraph 1 hereof and s 601NE (1) of the Act, or either of them, save for an obligation to co-operate with the Receiver in the performance of his duties and obligations.

10.11. The costs of the Third Respondent, Roger Shotton, of and incidental to the Applications, including reserved costs, shall be assessed on the indemnity basis, and shall be paid from the FMIF.

11.12. The voluntary administrators of the First Respondents, Ginevra Dawn Muller and John Richard Park, and the First Respondent, shall not recover their professional costs or disbursements

Adjourn all other questions of costs of + inc to appns

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*Direct that if order in form of draft para 12, that be made on application
 Direct that costs of complying i subs be dealt i at a later time to be fixed. Any time limitation under 418(5) is to allow necessary that*

(including legal costs) of responding to the Applications, or the FMIF investor meetings held on 30 May 2013 and 13 June 2013, from the EMIF.

AND THE COURT DIRECTS THAT

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~~12-14. Within 14 days from the date of this Order, LMIM shall provide to Mr Whyte a written summary of the claims known to it referred to in paragraph 5 hereof, together with documents and information to support such claims.~~

~~15-14. LMIM and Mr Whyte shall work cooperatively with each other to endeavour to agree on the disposition of such claims.~~

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Signed:

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383 of 2013

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

AND

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

AND

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

AND

Third Respondent: **ROGER SHOTTON**

AND

Intervener: **AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

ORDER

Before: Justice Dalton

Date: August, 2013

Initiating document: Originating Application filed 15 April 2013 by Raymond Edward Bruce and Vicki Patricia Bruce ("Application").

THE ORDER OF THE COURT IS THAT:

1. The Application be dismissed.
2. Each of the Applicants, Raymond Edward Bruce and Vicki Patricia Bruce, and Trilogy Funds Management Limited ACN 080 383 679, pay the costs of and incidental to the Application,

ORDER
Form 59 R.661

Filed on behalf of the Respondents

TUCKER & COWEN
Solicitors
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Brisbane, Qld, 4000.
Tele: (07) 300 300 00
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including the reserved costs, to be assessed on the standard basis, of the First Respondents and the Third Respondent, Roger Shotton.

Signed:

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TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DALTON J

No 3383 of 2013

RAYMOND EDWARD BRUCE and ANOTHER Applicant

and

LM INVESTMENT MANAGEMENT LIMITED
and ANOTHER Respondent

BRISBANE

9.01 AM, WEDNESDAY, 21 AUGUST 2013

Continued from 30.7.13

DAY 5

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.

RESUMED

[9.01 am]

5 HER HONOUR: Yes. All right. LM Investments – do you want to announce your appearances quickly, please?

MR B. O'DONNELL QC: I'm for the applicants, Mr and Mrs Bruce. O'Donnell QC with my learned friend, Ahern. I'm instructed by [indistinct]

10 HER HONOUR: Thanks, Mr O'Donnell. Yes.

MR S. COOPER: If it please the court, my name is Cooper, initial S. I appear for the first respondent, instructed by Russells.

15 HER HONOUR: Thank you, Mr Cooper.

MR S.J. FORREST: May it please the court, my name is Forrest, spelt with two Rs, initials S.J. I'm instructed by ASIC, appearing for ASIC.

20 HER HONOUR: Thanks, Mr Forrest.

MR D.R.W. TUCKER: Good morning, your Honour. My name's Tucker, initials D.R.W. Solicitor, Tucker and Cowan. I appear for Mr Shotten, the third respondent.

25 HER HONOUR: Yes. Thanks, Mr Tucker. Mr Litster.

MR G.J. LITSTER: Your Honour, my name is Litster, initials G.J. from the firm Synchronous Legal. I appear for two members of the second respondent, David Dunn and Anita Byrnes.

30 HER HONOUR: Thanks, Mr Litster. Yes. All right. Now, have we got some minutes of order?

35 MR TUCKER: Your Honour, could I hand you our submissions which do attach what I think is the current draft and I could take your Honour through and tell your Honour the points of difference, if that would assist.

HER HONOUR: Yeah. Can I write on this? Have you got a spare copy?

40 MR TUCKER: I'll get you one or you can have mine at the end. Yes.

HER HONOUR: All right.

45 MR TUCKER: So the order's just behind the submissions. The parties have agreed paragraphs - - -

HER HONOUR: Yes.

MR TUCKER: Paragraphs 1 to 4 are agreed.

HER HONOUR: Okay. I'll just read those. All right. Well, they're pretty well from your – one of the drafts you handed me up at the hearing.

5

MR TUCKER: They are, your Honour. Yes. There's been a little bit of fine tuning and taking on board some of the comments your Honour made as well.

HER HONOUR: Yes.

10

MR TUCKER: Paragraph 5, which is in the track changes is something the first respondent administrators want and is contentious. 6, 7 and 8 are agreed. The parts shaded in yellow, the first respondent administrators want that part deleted, and that's contentious. Over at paragraph 8(c), the administrators want that deleted. That's also contentious. Paragraph 10 is an order we included. It wasn't in the original draft. We included it at the suggestion of ASIC, and it seems to be consistent with, I think it's paragraph 121 of your Honour's judgment, but it's said to be contentious.

15

20 HER HONOUR: Yes.

MR TUCKER: Paragraph 11 is not contentious. If I just segue briefly into costs, that seems to be the one part that we all agree upon in terms of cost but there are some other arguments about that. And paragraph 12 is contentious in relation to the administrators' claim upon the fund for indemnity of costs. 13 and 14 are some directions that the administrators seek which we don't think are necessary. Well, they seem to be points in difference in terms of the order.

25

HER HONOUR: All right. Well, you can sit down, Mr Tucker, and I'll just read through paragraphs 5 and following now.

30

MR TUCKER: Thank you, your Honour.

HER HONOUR: What's clause 18.4 of the Constitution?

35

MR COOPER: Your Honour, could I have a copy of the Constitution.

HER HONOUR: Thanks very much, Mr Cooper. All right. Well, I've read that, Mr Tucker. Is it easier if I just run down the table and hear what everyone has to say about it? Mr O'Donnell, what do you want to say about this draft?

40

MR O'DONNELL: Nothing apart from when we come across.

HER HONOUR: All right. Thank you. Mr Cooper.

45

MR COOPER: Your Honour, could I hand up a brief outline just on the areas in contention. Paragraphs 5, 13 and 14 are put forward by my client. In my

submission, paragraph 5 simply makes clear that the appointment of Mr White does not affect any pre-existing rights which were held by LMIM or the administrators and in that respect it's no different to paragraph 4 which deals with the rights of the receiver appointed by the secured creditor. It doesn't grant any rights to my clients.
5 It just acknowledges that to the extent that rights exist, they are not intended to be affected by the appointment. Then - - -

10 HER HONOUR: But, well, just – won't it – let's deal with that. Why – why would anyone assume that something in the order did, that is, why would it be necessary to make that clear?

MR COOPER: Well, in the same way that it's really not strictly necessary to make it clear for the receivers appointed by Deutsche Bank.

15 HER HONOUR: Well, I don't know about that, because I'm appointing Mr White receiver. And so there's two receivers overlapping all the same property, so I'm not sure that that's so.

20 MR COOPER: Well, in the – if it is to later be said and we don't know if it will be that the appointment somehow prejudiced earlier rights of my client and/or the administrators then it's better that that be clarified now rather than become the subject of dispute later.

25 HER HONOUR: If there were – I'd agree with you if there's a real risk or a real possibility but I'm not going to make an order just – sorry, you talked to Mr Russell?

MR COOPER: No. I - - -

30 HER HONOUR: Well, I'm not going to make an order starting at shadows. I mean, unless there's a real reason for it, I can't see why I should.

MR COOPER: Yes, your Honour. Could I just take some instructions?

35 HER HONOUR: Yes

40 MR COOPER: Your Honour, I'm instructed that it's been inserted there as a consequence of some discussions between my client and its representatives and representatives Mr White and his representatives. If it's to be said by Mr Tucker now that there is no suggestion of any prejudice to these claims then I agree, your Honour, that there would be no need, and it wouldn't be pressed.

45 HER HONOUR: Well, I just can't see that anything in the order does interfere with any accrued or indeed continuing rights that your client might have. I also have a bit of – nothing in this order prejudices any right of indemnity or lien or associated interest of FMIF for any costs or expenses or for any liability to any – there's a lot of – it's very wrapped up.

MR COOPER: Well, with respect, we agree. We agree with your Honour that the order doesn't prejudice, so if your Honour regards it as unnecessary on that basis, then there is no need. There is no need to include it.

5 HER HONOUR: All right. Well, that's five. Now, is it - - -

MR COOPER: On that basis, 13 and 14 would also fall by the wayside because they refer back to - - -

10 HER HONOUR: I think that's right. I think if - I think if a real dispute arises and it can't be sorted out, then it - the matter would have to come back to court. I just think it's - you're using very general - because you're trying to comprehend something - or a series of permutations that aren't known, so you're using very general language when there's actually no real dispute even foreshadowed. I think
15 I'd prefer - - -

MR COOPER: Yes, your Honour.

HER HONOUR: I think I'd prefer to leave it.

20

MR COOPER: But - - -

HER HONOUR: And it's prophylactic, but I just can't see any - I can't see any real reason for the prophylaxis, if you know what I mean.

25

MR COOPER: No. Your Honour, the orders were put in there because orders to similar effect were made in proceedings in which my client was replaced as the trustee of the unregistered managed performance fund, and in my instructions, they worked well in those proceedings. But if they're not necessary, my client won't
30 press for them.

HER HONOUR: All right.

MR COOPER: In respect of 8A, the shaded portion, there's no objection to that
35 section.

HER HONOUR: All right.

40 MR COOPER: The objection to 8C is maintained. Your Honour has looked at paragraph 18.4 of the constitution. There are many matters in that paragraph that have nothing to do with the winding up of the fund. It seems to my client that there's no reason as to why it should have the powers in subparagraph A, B, C, D, E, F, G, I, or L. The powers conferred upon Mr White in the balance of the order, in my submission, is sufficient to permit him to conduct the winding up and grants him all
45 of the powers that he requires.

5 HER HONOUR: Yeah. It – the point is the same, or it’s associated with the paragraph 10 point, isn’t it, and that comes back to something I raised during the hearing. There’s a real tension, I think, between – and it comes from the act, I think, that the responsible entities directed to wind up, but then somebody else is really given control of it.

10 MR COOPER: Yes. Yes, your Honour. But in my submission, that tension isn’t appropriately dealt with by granting the powers or the ability to exercise duties identified in clause 18.4. It’s dealt with by the conferral of the powers as a receiver.

HER HONOUR: Well, if there’s some – that’s right, and the act contemplates that there still will be a responsible entity.

15 MR COOPER: Yes, your Honour.

HER HONOUR: And still have some function to perform, and you’re right, some of the 18.4 duties are transfer of and transmission of units, for example. It’s almost acting as a registry, isn’t it? It’s - - -

20 MR COOPER: Yes.

HER HONOUR: But it’s just – it’s a hard – I don’t know what the drafters were thinking when they did it. But it – I think it all comes back to that: why didn’t the act just say wind up, let someone else wind it up, if that’s what it meant?

25 MR COOPER: Yes. But none of these powers are incidental to a winding up.

HER HONOUR: Well, K is. But - - -

30 MR COOPER: Well - - -

HER HONOUR: And some of them might overlap.

35 MR COOPER: Yes, your Honour.

HER HONOUR: The sale of real estates or assets of the scheme property, but I understand your point, Mr Cooper.

40 MR COOPER: Yes.

HER HONOUR: And I do understand the point. It’s - - -

45 MR COOPER: Yes. Thank you, your Honour. Paragraph 10: the concern about this paragraph arises because on my instructions, in discussions between the first respondent and Mr White and the various representatives, a view’s been expressed that following Mr White’s appointment, the first respondent will have nothing to do as responsible into the fund, and as your Honour pointed out, the act contemplates

5 that there will continue to be a responsible entity. So it's not the case that the first respondent will have nothing to do as responsible entity. Aside from the question of winding up, the first respondent remains subject to a number of duties under the act as responsible entity, so it – paragraph 10 could be directed to one of two things. If it is intended to simply make clear that Mr White is to conduct the winding up, then in my submission, it's unnecessary because paragraph 1 makes that clear in stating that the direction - - -

10 HER HONOUR: That's why I wanted it subject to the following orders.

MR COOPER: Yes. And that is - - -

15 HER HONOUR: That's also why I put that sentence in my judgment about – that was my intention that they – it does go back to the point I think I raised with everyone during the hearing. Number one: did this – was there a necessity for there to continue to be a responsible entity, and two, could I make an order just saying that somebody else wind up the fund?

20 MR COOPER: Yes. Yes, your Honour.

25 HER HONOUR: And the view from both ASIC and from Mr Tucker was that the responsible entity should stay there and that I shouldn't make an order to say that someone else should wind up the fund, which, you know, I – that's right. I accept that, and I accept that the difficulty in it probably comes from the act. If people had wanted to argue something else, I would have been quite happy to entertain that too. But that's how it was argued.

30 MR COOPER: Yes, your Honour. So that is the first possibility, that it does no more than paragraph 1, in which case there's no reason to include it. If it's intended to go beyond paragraph 1 and affect the responsible entity's role outside of the winding up, then in my submission that goes too far. But there's no justification for such an order, and it would prevent my client from complying with responsibilities under the act if it's excluded from – by the terms of that order from seeking to comply with those obligations.

35 HER HONOUR: Yep. All right. I understand that. That leaves 12. Is that right?

40 MR COOPER: Yes, your Honour. On the issue of costs, the first respondent seeks to have the argument on costs deferred to another date, and in that regard, I'd seek your Honour's leave to write – read and file an affidavit of Steven Charles Russell, sworn this morning. There are two bases upon which such a direction is sought.

HER HONOUR: Does anyone object to my receiving this affidavit?

45 MR FORREST: No, your Honour.

MR O'DONNELL: No, your Honour.

HER HONOUR: All right. Leave to read and file.

MR COOPER: The first is – your Honour’s reasons contain a number of statements that are critical of the matter in which the first respondent conducted its defence of
5 the applications, and those observations will obviously be relevant to questions of costs. Connected with that, it’s obvious from submissions from ASIC and also from paragraph 12 itself in Mr Shotton’s draft of the order that what is sought is to deprive
10 the first respondent of its right to indemnity out of fund assets, and authorities on that question recognise that this is a serious matter. In light of that, the first respondent wishes to have Mr Sheahan, who was trial counsel and is familiar with the evidence, argue the question of cost.

Mr Russell deposes to the fact that when he was informed by your Honour’s associate of today’s hearing, he made enquiries of Mr Sheahan. Initially, he was told
15 that Mr Sheahan hoped to be available for today, but by Friday of last week, it had become clear that Mr Sheahan wasn’t available and that there wasn’t sufficient time to bring someone else on a properly briefed basis. So that’s the first basis upon which a deferred hearing is heard. The second is the nature of the – or the extent of the relief sought by Mr Shotton in paragraph 12, which goes beyond what my client
20 understands to be ASIC’s position.

HER HONOUR: Well, it goes beyond the costs of this application too.

MR COOPER: Yes, your Honour.

HER HONOUR: It’s a substandard matter.

MR COOPER: Yes. It affects the administrators personally when they are not parties to this proceeding, or it seeks to bind them. It also seeks to deal with
30 professional costs beyond the legal costs of an incidental, and up until this morning, no outline had been provided. An outline has been provided, but even in that outline, the basis upon which it’s said the court should, in dealing with the costs of this proceeding, go and deal with those other matters hasn’t been articulated, and my client would require time to consider whatever arguments are to be raised and to
35 respond.

HER HONOUR: Yeah. Well, I’ll hear Mr Tucker on it, but I think that you can assume you’ve persuaded me of that position.

MR COOPER: Thank you, your Honour. There is one other matter in relation to costs which doesn’t arise from the order.

HER HONOUR: Well, now, just to clarify.

MR COOPER: Yes, your Honour.

HER HONOUR: Are you happy with paragraph 11, or should I deal with all the costs?

5 MR COOPER: I think it would be – in my submission, it would be better to deal with all the costs together. On my instructions, there's no opposition. There's no opposition to that paragraph, but perhaps it's better that all the costs be reserved pending a hearing on a date convenient to the court and parties. Just one final issue on costs: at approximately 8.15 last night, my instructing solicitors received an email from the solicitors for the applicant saying that the applicant's intended to make an application that my client pay costs incurred in responding to a number of subpoenas that were issued earlier in the proceedings. In my submission, that's not an appropriate matter to be dealt with today for a number of reasons. It doesn't arise out of the hearing. It doesn't concern the other parties. It ought to have been made on application, in which case my client would have had time to consider it and respond, and frankly, my client, given the late notice, simply isn't in a position to respond to such an application today. Thank you, your Honour.

HER HONOUR: All right. Thank you, Mr Cooper. All right. Mr Forrest.

20 MR FORREST: Your Honour, can I start by apologising for appearing robed. There was some confusion about - - -

HER HONOUR: No. That's all right.

25 MR FORREST: May I at least have leave to remove my wig.

HER HONOUR: Oh, you remove it. Just assume that I think you've got some more important engagement later on, Mr Forrest.

30 MR FORREST: Nothing more important than this, your Honour. Your Honour, I start with the orders. Mr Tucker was correct by apportioning responsibility for the new paragraph 10 to ASIC. That was our insertion. Your Honour, the motivation behind that new paragraph 10 was to reduce the scope for demarcation disputes arising in the future between Mr White and the administrators of the first respondent. 35 ASIC apprehends, from your Honour's judgement, particularly paragraph 121 that your Honour was anxious to avoid the potential for two separate sets of insolvency practitioners changing the fund.

HER HONOUR: Yep.

40

MR FORREST: ASIC is also anxious that, that not occur.

HER HONOUR: Yep.

45 MR FORREST: ASIC also apprehends that it was your Honour's intention that Mr White wind up the fund to the exclusion of the administrators to the fullest extent that's possible in accordance with the Corporations Act. And our proposed

paragraph 10 is just an attempt to give effect to that intention. It's opposed on two bases, firstly on the basis that it's unnecessary. Well, we hope it's unnecessary and I take on board what your honour said to Mr Cooper in another context about boxing at shadows but - - -

5

HER HONOUR: Well, it is something I did raise during the hearing because I was concerned about it and that's why separately I do record in my judgment that neither ASIC nor Mr Shotten asked me to go further really than the equity trust style order where the responsible entity remains. Somebody else has given responsible for ensuring the winding up takes place and there's a receivership which, as I think I remarked a few times during the hearing, is a clumsy way. I can see the origin is it is the wording of the act. I would have entertained an application for a different order but none was made. I understand your concern - - -

10

15 UNIDENTIFIED SPEAKER: Your Honour, can I – can I just respond - - -

HER HONOUR: But I'm really not – paragraph 10, the draft – it's a bit of a strange beast really in that it tends to – why have I made the order in paragraph 1 if I'm just going to negate it 10 paragraphs later.

20

MR FORREST: Yes.

HER HONOUR: That's why I asked at the time I gave judgment that paragraph 1 have subject to the orders below in it. I'm not really sure that unless a real dispute occurs that I should go beyond that qualification to paragraph 1.

25

MR FORREST: Thank you, your Honour. Could I just try and attack that from another angle perhaps?

30

HER HONOUR: Yep.

MR FORREST: At the risk of incurring your Honour's frustration.

35

HER HONOUR: No. I'm not frustrated.

MR FORREST: Thank you, your Honour. As to whether it was asked for at the trial, the draft handed by ASIC had that version of the order in it. Your Honour invited us to submit drafts at the end of the trial. Our draft did have a version of that order in. The - - -

40

HER HONOUR: But it was – I did raise it in argument and nobody was biting from your end of the bar table – either you or Mr Tucker.

45

MR FORREST: That's quite – your Honour is quite right about that and - - -

HER HONOUR: So I'm not going to do these things without arguing because it would be – it would be a step after the equity trust style order.

MR FORREST: Indeed. Your Honour's quite right about that and the concern, I think that we expressed at the trial was that the structure of that section of the – the structure of that vision in the Corporations Act seems to contemplate that there will a responsible entity and I think our submissions orally and I'm not going from the transcript - - -

HER HONOUR: It does. And - - -

MR FORREST: - - - from memory whether – we didn't know – we couldn't find the way around leaving the responsible entity in place. Having said that, section 601 and NF (1) does contemplate circumstances in which a responsible entity all but ceased to exist or would no longer be capable of winding up the scheme. I think Applegarth J in his judgment in equity trust expressed it in terms of responsible entity being incapable of winding up the scheme under the oversight of a person appointed under NF (1). And so although the act contemplates that the responsible entity remain - and we don't contend that our paragraph 10 would remove them. The purpose is out of an abundance of caution to make it clear the purposes of avoiding as I say, demarcation disputes in the future that they are not to encroach upon Mr White's responsibilities. I won't take that any further your Honour but that's ASIC's submission about paragraph 10. I think the other paragraphs to the order have been dealt with already, subject to costs. Can I say in respect of costs argument, your Honour - - -

HER HONOUR: Well, can I say this?

MR FORREST: Yes.

HER HONOUR: I'm resuming a murder trial at 10 o'clock. I'm not – whatever – I'm not hearing costs submissions today. It seems to me, quite frankly, that Mr Cooper's right, that if an order like paragraph 12 is going to be sought - it's a substantive order. It's not even a consequential costs order on this application so my inclination is not to deal with anything except perhaps paragraph 11 and I'll hear Mr Tucker on that about costs today. I really think there should be time set aside for proper argument about that and if there's – Mr Cooper's told me about an application in relation to the subpoena. You people may not be interested in that but again, I think those issues need to be properly defined by application and perhaps affidavit material and there needs to be proper argument. That's my inclination about - - -

MR FORREST: Very well, your Honour.

HER HONOUR: I certainly don't have time to be hearing on costs arguments this morning.

MR FORREST: Thank you, your Honour. May I just say in respect then of paragraph 11 – from ASIC's perspective there's no reason why that order can't be made today.

HER HONOUR: Okay.

MR FORREST: Thank you. I have nothing further.

5 HER HONOUR: Thank you. Mr Tucker?

MR TUCKER: Your Honour, I won't address paragraph 12 today. In terms of the draft order in paragraph 8 (c) - - -

10 HER HONOUR: Yeah.

MR TUCKER: - - - each of these powers are -- we would submit powers are going to be incidental to winding up. Take (a) and (b), for example, they deal with transfer and transmission of units and ordinarily on these things you'll have people pass away and there'll be transmissions by death and the like, which need to be dealt with. So it's either the RE's doing it or Mr White's doing it in the interest of winding up the fund. The next paragraphs through (c) through to (q) you really deal with loans and loan management and maybe extensions of loans. There may be fees charged for extensions as part of winding up the loans and that sort of thing so those are all incidental to winding up fund.

(h): the sale of the assets seems to be part of what winding up is. (i): the management of scheme again. (j): there's a custodian involved and there will no doubt have to deal with the custodian. And (k) we think is self-explanatory so. We thought it would all be clear to vest in with the very powers dealing with the fund. We thought they'd also have a benefit in the sense that we don't face an RE who may later claim some form of management fee for doing what it said are these powers which may end up being reserved to it by being left out of the order.

30 HER HONOUR: All right. I do -- I understand your point and it's, as I've discussed with both Mr Cooper and Mr Forrest -- it's something that we did discuss during the trial and the hearing.

MR TUCKER: Yes.

35 HER HONOUR: As to whether a more intrusive order, if I can put it that way, than the equity trust style order could be made.

MR TUCKER: I didn't take your hints.

40 HER HONOUR: Well, you didn't.

MR TUCKER: No.

45 HER HONOUR: And, you know, I do think it might be starting at shadows. If there are difficulties in the future with demarcation well, the matter can come back to court. Perhaps somebody will ask for a wider style order then. And Mr Forrest was

5 just starting to articulate some of the reasons why there must be, I'd suspect power to make a wider order because if the responsible entity has ceased to exist somebody, I suspect, must be put in as the sole controller of the fund. But anyway I think it might be a little late in the day to sort of be dealing with those things now in the absence of some new demarcation dispute.

10 MR TUCKER: The only thing I'd say is it's – that was a part of the draft we did seek originally. We did argue that at the trial but I won't say anything further if your Honour's against me about it. I don't propose to say anything in relation to paragraph 10 or 12 and in terms of the costs we do make the point about non-recovery of the legal costs from the fund. That's the same submission that ASIC make and we do wish to articulate that.

15 HER HONOUR: What – sorry, what's that?

MR TUCKER: Sorry. the way paragraph 12 is drafted talks about the administrator's fees and not recovering those. Separate to that and it's sort of buried within the detail of paragraph 12 is the reference to not recovering legal costs associated with resisting the applications from the funds.

20 HER HONOUR: All right.

MR TUCKER: And we do wish to press that at the appropriate time.

25 HER HONOUR: Right.

MR TUCKER: In terms of paragraph 11, I would invite your Honour to make the order now because if it's made it's done and then I'm not subject to getting caught in the crossfire about further submissions in relation to it. Everybody's been on notice, that that's what we've sought, for at least a week. ASIC told me they consent. Nobody else objects to it.

HER HONOUR: No. Nobody else seems to object to it.

35 MR TUCKER: Nobody.

HER HONOUR: All right. Thanks, Mr Tucker.

40 MR TUCKER: Thank you, your Honour.

HER HONOUR: Mr O'Donnell, did you want to say anything about your costs matter now? My inclination is – I'm not going to deal with costs this morning.

45 MR O'DONNELL: No I - - -

HER HONOUR: My inclination is to have another mention where we deal with costs.

MR O'DONNELL: Happy with that. We've got written submissions we could hand up to your Honour's associate.

HER HONOUR: All right. Thanks.

5

MR O'DONNELL: Setting it out – our arguments on costs.

HER HONOUR: Yeah. Have the – I just want the submissions – they'll go on the file. I don't want cases attached to it.

10

MR O'DONNELL: There's one additional complication which is – does your Honour have the rules there?

HER HONOUR: No.

15

MR O'DONNELL: I'll hand up rule 4. It's the rule about a non-party seeking costs of answering a subpoena. And there's a time cut-off under subrule (5). So the cut-off seems to be when the substantive orders are made. So if your Honour makes order today it would shut out the non-parties who incurred costs in answering LM's subpoena. They do wish to press for those costs. One option might be if your Honour granted extended the time for making the application to recover costs for the subpoenas.

20

HER HONOUR: Yes.

25

MR O'DONNELL: Until after the final orders are made.

HER HONOUR: All right. That seems sensible.

30

MR O'DONNELL: And the only affidavits we want to rely on for costs are costs simply evidencing that the non-parties did incur substantial costs that - - -

HER HONOUR: All right. And this is only going to concern you and the first respondent, isn't it?

35

MR O'DONNELL: Yes. It is.

HER HONOUR: All right. Well, can I suggest, then, that the – that dispute about the subpoenas doesn't need to be argued at the same time as other costs order consequential on the application, does it?

40

MR O'DONNELL: Doesn't have to be but [indistinct] trial judge so it's sensible for the trial judge to determine.

45

HER HONOUR: Oh, yes. It's sensible for me to do it all but I'm just thinking about finding time to do it.

MR O'DONNELL: Yes.

HER HONOUR: And also not incurring further costs having parties not involved in that subpoena fight present during it.

5

MR O'DONNELL: Yeah. But it could be done in written submissions as well.

HER HONOUR: All right. Well, can I ask, then – I won't deal with costs today. There's no reason I shouldn't make paragraph 11. You don't object to that.

10

MR O'DONNELL: No, no.

HER HONOUR: I'll make that order today in Mr Tucker's client's favour. I'll otherwise adjourn the issues of costs, and can I ask, then, all the parties to talk about when there's a time that suits all counsel, and maybe you can get a selection of available days and email my associate with that, and if – I'm certainly receptive to the idea of doing it on the papers if people can do it that way and want to do it that way. Otherwise, we'll just find some hearing time. But it just seems to me that, well, we can do it – just see how it falls out. We can do it all on the same day and maybe ASIC and Shotten and your clients, Mr Litster, go at the time we finish discussing common costs issues, and we can deal with the subpoena costs later.

15

20

MR O'DONNELL: Yes, your Honour.

25 HER HONOUR: Just see how that works out.

MR O'DONNELL: Does your Honour envisage setting aside a day or a half-day.

HER HONOUR: I think it would be – well, do you want to give me an estimate but I think it would at least be a half-day.

30

MR O'DONNELL: Half-day.

HER HONOUR: I think at least. And I really do think if there are going to be orders like that proposed at paragraph 12 of the draft, that is a substantive application, really. That is not just consequential on the determination of the trial that was before me.

35

MR O'DONNELL: Yes.

40

HER HONOUR: So if someone wants to do that I really think that an application ought to be brought for those costs.

MR O'DONNELL: Yes, your Honour.

45

HER HONOUR: All right, then. Thanks, Mr O'Donnell. That's what I'll do. Now, looking at the draft which is attached to the submissions on the part of Shotten

5 filed this morning. I'm content with orders 1, 2, 3 and 4. I'm not going to make the order at paragraph 5. I don't think there is anything before me of a real issue showing that there's utility in that order. I can't see that there's any obvious prejudice to any accrued or continuing rights that there's any need for clarification in that regard so I refuse to make paragraph 5 of that draft. Paragraph 8a is not controversial in the event so I'm happy to leave the shaded words in on paragraph 8a. Really for reasons I've expressed during argument, I'm not going to make an order in terms of 8c and I'm not going to make an order in terms of 10 of that draft.

10 Again, I think they're both there in anticipation as it were of demarcation disputes which may arise and I hope they don't arise. I think if disputes do arise in the future it's better that the court deal with a real dispute rather than trying to prophylactically deal with something when the nature and extent of it isn't known. So I'm refusing to make 8c, and I'm refusing to make 10. I make paragraph – the order at draft
15 paragraph 11 and I will adjourn all other questions of costs of and incidental to this application, and I'll direct that if any order such as is sought in paragraph 12 of the draft is persisted with, that that be made on application to be heard at the same time as the costs of and incidental to the application are argued and decided.

20 And I'll further direct that costs of complying with subpoenas issued in the proceeding be dealt with at a later time to be fixed and that any time limitation by reason of rule 4185 is extended to allow the hearing of those applications at that adjourned time. There's no need for draft orders at paragraph 13 and 14 – sorry,
25 there's no need for the orders at paragraphs 13 and 14 of the draft because they were consequential on paragraph 5 of the draft being made and it won't be made. So, as I say, I make those orders and directions today and leave it to the parties to contact my associate with some suitable times for hearing of the costs applications, if I can put it that way.

30 MR TUCKER: Thank you, your Honour. I'll have that amended and sent to your associate if that's convenient.

HER HONOUR: I think that would be good. If you can send that through and I'll initial it and so the actual order on file will be the order as per draft and I'll send a
35 PDF with my initials on it back to all parties.

MR TUCKER: Thank you, your Honour. Your Honour asked for a spare copy?

40 HER HONOUR: Oh, that's all right. I managed not to write on this one as it happened, Mr Tucker. All right. Well, thanks very much. I'll get - - -

MR TUCKER: Could I raise one other small matter?

45 HER HONOUR: Yes.

MR TUCKER: Just dealing with the question of costs. Parties [indistinct] Trilogy. Trilogy, according to Mr Wood, depose that they indemnify the Bruces and that's in

5 Mr Wood's affidavit of 6 May where he deposed to that. There's no document produced. We've asked several times for whatever that document may be to evidence the indemnity. We say we're entitled to pursue under rule 222. It's just not produced. Am I able to invite your Honour to direct that that indemnity be produced in advance of that costs hearing?

HER HONOUR: Well, why do you need that?

10 MR TUCKER: To see what capacity, if any, they have granted indemnity. So is it Trilogy in their own right or is it as the responsible entity of the wholesale fund, for example. It should answer the question of ultimately who may in fact be liable. So say, for example, it's the wholesale fund and then Trilogy is removed from the wholesale fund. The costs order may ultimately be recovered [indistinct] whereas if they're removed, it's only as against Trilogy.

15

HER HONOUR: Mr O'Donnell, do you know about that issue?

MR O'DONNELL: We don't agree to the [indistinct] your Honour.

20 HER HONOUR: Well, I think it's something that I might hear at some time on proper argument, really. It certainly was clear beyond doubt that Trilogy was indemnifying the Bruces.

25 MR O'DONNELL: Yes. That's right.

HER HONOUR: And, in fact, Mr Morrison told me that he – the views he expressed were the views of Trilogy.

30 MR O'DONNELL: That's right. But the Bruces are here. They're a party. If there is an order for cost to be made against them, that can be made against them.

HER HONOUR: I think that's right. Anyway, I'm not going to decide that [indistinct] a lot of law about [indistinct] if you really want to.

35 MR TUCKER: I'm just seeking the document at this stage.

HER HONOUR: Yes. I know. But I'm not going to decide even that without argument.

40 MR TUCKER: Certainly, your Honour.

45 HER HONOUR: No doubt that there's a lot of things that can be fought about in this matter, but I have doubts about the wisdom of continuing to fight about some of it. Anyway, Mr O'Donnell, can I have my associate give you back your page from the rules.

MR O'DONNELL: Thank you, your Honour.

HER HONOUR: And if that – if the matter of the document has to be determined, Mr Tucker, I'll determine it. But, again, it will be a matter of fixing a time for argument and having an argument about it.

5 MR TUCKER: Thank you, your Honour.

HER HONOUR: All right. Thank you. Would you adjourn the court, please?

10 **ADJOURNED**

[9.49 am]