

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3508 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**

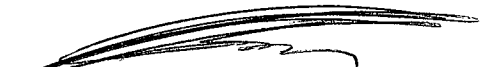
AND

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 JRP-1 to the Affidavit of **JOHN RICHARD PARK** sworn *W* April, 2015:



Deponent



Solicitor/Barrister/Justice of the Peace

CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicants

Form 47 Rule 435

Russells
Level 18
300 Queen Street
BRISBANE 4000
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LM INVESTMENT MANAGEMENT LIMITED

ABN 68 077 208 461

Australian Financial Services Licensee 220281

AND

THE MEMBERS AS THEY ARE CONSTITUTED

FROM TIME TO TIME OF THE

LM FIRST MORTGAGE INCOME FUND

ARSN 089 343 288

REPLACEMENT

CONSTITUTION

DEED made this 10 day of April 2008

BETWEEN: LM INVESTMENT MANAGEMENT LIMITED ACN 077 208 461 a company duly incorporated in Queensland having its registered office at Level 4, RSL Centre, 9 Beach Road, Surfers Paradise in the State of Queensland (the Responsible Entity hereinafter referred to as the "RE")

AND: All those persons who from time to time apply for Units and are accepted as Unitholders of the Scheme ("the Members")

WHEREAS:

- A. The RE holds a responsible entity's licence from the ASIC.
- B. The RE established a pooled mortgage unit trust called the LM Mortgage Income Fund on 28 September 1999. From 31 May 2007 the LM Mortgage Income Fund will be known as the LM First Mortgage Income Fund.
- C. By applying to invest in this Scheme through a PDS a person will become a Member and be bound by this Constitution.
- D. Clause 26.1(b) and section 601GC(1)(b) of the Law allow the RE to modify or repeal and replace the Constitution where the RE reasonably considers the change will not adversely affect Members' rights. The RE is satisfied the amendments contemplated by this replacement Constitution will not adversely affect Members' rights.
- E. Accordingly with effect from the date of this deed poll, the existing constitution of the Scheme is repealed and replaced with this Constitution.
- F. This Constitution is made with the intent that the benefits and obligations hereof will enure not only to the RE but also to the extent provided herein to every person who is or becomes a Member.

IT IS AGREED:

1. DICTIONARY AND INTERPRETATION

1.1 Dictionary of Terms

In this Constitution:

"Accounting Standards" means the accounting standards and practices determined under clause 1.3;

"Adviser" means the financial adviser who has offered Unit/s in this Scheme to a Member;

"Applicant" anyone who submits an application for Unit/s in the Scheme in accordance with the PDS;

"Application" means a request from a Member to the RE to issue Units in a managed investment scheme pursuant to an Arrangement;

"Application Form" an application in writing for Unit/s in the Scheme attached to the PDS.

"Application Money" the amount received from an Applicant when lodging the

Application in respect of the Unit/s applied for in accordance with the PDS;

"Arrangement" means a written arrangement between the RE and a Member that sets out the circumstances in which Applications for Units in registered schemes operated by the RE, may be accepted;

"ASIC" the Australian Securities and Investments Commission;

"ASIC Instrument" means:

- (a) an exemption or modification granted by ASIC in accordance with Part 5C.11 of the Law; or
- (b) any other instrument issued by ASIC under a power conferred on ASIC which relates to the RE or the Scheme.

"Auditor" means the auditor of the Scheme appointed by the RE under clause 27.1 and shall be qualified to act as a registered scheme auditor pursuant to the Law;

"Authorised Investments" means

- (a) monies deposited (whether secured or unsecured) with a Bank, or any corporation related to a Bank or other corporation or monies deposited with any trustee company, fund, bills of exchange, certificates of deposit and negotiable certificates of deposit issued by a Bank or similar instrument accepted and endorsed by a Bank;
- (b) any investments the time being authorised by the laws of the Commonwealth of Australia or any State or Territory thereof for the investment of trust funds;
- (c) monies deposited with an authorised short term money market dealer as such expression is used in section 65 of the Law;
- (d) any investment in or acquisition of cash, stocks, bonds, notes or other securities or derivatives issued by the Government of Australia, any other country, any company, corporation, body corporate, association, firm, mutual fund or unit trust;
- (e) any investment in or acquisition of options, entitlements or rights to any of the securities or derivatives referred to in clause (d) of this provision;
- (f) real property or interests in real property whether by acquisition of units in unit trusts or otherwise;
- (g) interests in any registered managed investment scheme (as defined in the Law) including but not limited to any scheme of which the RE acts as RE;

- (h) making loans to any person or company with or without interest, whether secured or unsecured, and for any period whatsoever; and
- (i) the acquisition of foreign currencies, hedging contracts, commodity contracts of any kind which are quoted on a financial market (as defined in the Law).

"Bank" has the meaning given to an ADI in section 5 of the Banking Act 1959 (Cth) and also includes an ADI constituted by or under a law of the State or Territory and a foreign ADI as that term is defined in section 5 of the Banking Act 1959 (Cth).

"Borrower" any person who applies to the Scheme to borrow Scheme Property and who is approved by the RE;

"Business Day" any day on which trading Banks are generally open for business on the Gold Coast, Queensland;

"Class" means a class of Units, being Units which have the same rights.

"Commencement Date" means the date of registration of the Scheme;

"Compliance Committee" the Compliance Committee of the RE.

"Compliance Plan" means the Compliance Plan for the Scheme lodged at the ASIC on Scheme registration;

"Constitution" this document including any Schedule, Annexure or Amendments to it and which also means the Unit Trust Deed;

"Custodian" Permanent Trustee Australia Limited ACN 008 412 913;

"Custody Agreement" an agreement dated the 4th day of February, 1999 and any further amendments entered into between the Custodian and the RE;

"Development Loan" a loan to fund the construction of a building on mortgaged property which is to be drawn down before completion of the building;

"Differential Fee Arrangement" means an arrangement pursuant to Class Order [CO 03/217] which provides an exemption from S601FC(1)(d) of the Law in relation to differential fee arrangements offered to investors investing in the Fund as a Wholesale Investor, within the meaning of Wholesale Client in Section 761G of the Corporations Act;

"Distributable Income" has the meaning given in clause 11.3;

"Distribution Period" is the relevant period referred to in clause 12.1;

"Dollars", "A\$" and "\$" mean the lawful currency of the Commonwealth of Australia;

"Extraordinary Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by

at least 50% of the total votes that may be cast by Members entitled to vote on the resolution (including Members who are not present in person or by proxy);
"Financial Year" means the period of 12 months ending on the 30th day of June in each year during the continuance of this Constitution and includes the period commencing on the date the trust was established and expiring on the next succeeding 30th day of June and any period between the 30th day of June last occurring before the termination of the trust and the termination of the trust;

"FICS" means the Financial Industry Complaints Service Limited;

"GST" means a tax, impost or duty on goods, services or other things imposed by any fiscal, national, state, territory or local authority or entity and whether presently imposed or novel, together with interest or penalties either before or after the date of this Constitution;

"Income" means all amounts which are, or would be recognised as, income by the application of the Accounting Standards;

"Issue Price" means the price at which a Unit is issued calculated in accordance with clause 6.

"Investment Term" means the initial fixed investment term selected by the Member when they invest in the Scheme for a fixed term, and any subsequent fixed term for the investment where the investment is rolled over for that subsequent term, but does not include any fixed term under a Savings Plan Investment (and the initial fixed investment term and each subsequent fixed term will each be a separate Investment Term, and not a longer combined Investment Term);

"Law" means the Corporations Act 2001 and the Corporations Regulations.

"Lender" means the RE on behalf of the Members lending Scheme Property through the Scheme;

"Lending Rules" means the rules detailed in clauses 13.2 and 13.3;

"Liabilities" means at any time the aggregate of the following at that time as calculated by the RE in accordance with the Accounting Standards:

- (a) Each liability, excluding Unit Holder Liability, of the RE in respect of the Scheme or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (b) Each other amount payable out of the Scheme, excluding Unit Holder Liability or, where appropriate, a proper provision in accordance with the applicable Accounting Standards in respect of that liability.
- (c) Other appropriate provisions in accordance with the applicable Accounting Standards.

"Liquid Scheme" means a registered scheme that has liquid assets which

account for at least 80% of the value of scheme property.

"LMM" means Law Mortgage Management Pty Ltd ACN 055 691 426;

"LVR" means loan to valuation ratio and is the ratio of the amount of a loan to the valuation of the property offered as security for a loan in the Scheme;

"Member" in relation to a Unit, means the person registered as the holder of that Unit (including joint holders).

"Minimum Investment" means the minimum investment disclosed in the PDS from time to time unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment;

"Minimum Subscription" means any minimum amount of Application Money of a particular currency required by the RE to be received in respect of one or more Applicants, before the Application(s) will be accepted by the RE;

"Mortgages" in all mortgages held by the Scheme the Mortgages will be the Custodian as agent for the RE;

"Mortgage Lending Valuation Policy" means the RE's mortgage lending valuation policy as detailed in the Compliance Plan;

"Net Fund Value" at any time, means the value of the Scheme Property less the Liabilities at that time.

"Power" means any right, power, authority, discretion or remedy conferred on the RE by this Constitution or any applicable law;

"Promoter" for the purpose of the Law the promoter of this Scheme is the RE;

"PDS" means a Product Disclosure Statement or any Supplementary Product Disclosure Statement for the Scheme;

"Register" means the register of Members maintained by the RE under clause 22;

"Responsible Entity" or "RE" means the company named in the ASIC's records as the responsible entity of the Scheme and referred to in this document as the RE and who is also the Trustee of the Scheme;

"Savings Plan Investment" means an Australian dollar investment described as the "LM Savings Plan" in the PDS, with terms and conditions as disclosed in the PDS;

"Scheme" means a managed investment scheme to be known as the "LM First Mortgage Income Fund" that is to be registered under s601EB of the Law and also means the Trust;

"Scheme Property" means assets of the Scheme including but not limited to:

- (a) contributions of money or money's worth to the Scheme; and
- (b) money that forms part of the Scheme assets under the provisions of the Law; and

- (c) money borrowed or raised by the RE for the purposes of the Scheme; and
- (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) the income and property derived, directly or indirectly from contributions, money or property referred to in paragraph (a), (b), (c) or (d);

"Scheme Valuation Policy" means the scheme valuation policy as detailed in the Compliance Plan;

"Security Property" means any property offered by a Borrower as security for a Mortgage in the Scheme;

"Special Resolution" means a resolution of which notice has been given in accordance with this Constitution and the Law and that has been passed by at least 75% of the votes cast by Members entitled to vote on the resolution;

"Subscription Account" an account opened and maintained by the RE into which is deposited all Application Moneys;

"Tax" includes, but is not limited to:

- (a) stamp duty, excise and penalties relating to these amounts which are imposed on the RE in respect of any assets in the Scheme;
- (b) taxes and duties and penalties relating to these items imposed as a result of any payment made to or by the RE under this Constitution;
- (c) taxes imposed or assessed upon:
 - (i) any Application Money;
 - (ii) distributions of Income to Members, capital gains, profits or any other amounts in respect of the Scheme; or
 - (iii) the RE in respect of its capacity as responsible entity of the Scheme;
- (d) imposts, financial institutions duties, debts tax, withholding tax, land tax or other property taxes charged by any proper authority in any jurisdiction in Australia in respect of any matter in relation to the Scheme, and every kind of tax, duty, rate, levy, deduction and charge including any GST;

"Tax Act" means the Income Tax Assessment Act 1936 (Cth) and the Income Tax Assessment Act 1997 (Cth);

"Trustee" means the RE;

"Uncontrolled Event" means an act of God, strike, lock out or other interference with work, war (declared or undeclared), blockage, disturbance, lightning, fire, drought, earthquake, storm, flood, explosion, government or quasi-government restraint, exploration, prohibition, intervention, direction,

embargo, unavailability or delay in availability of equipment or transport, inability or delay in obtaining governmental or quasi-governmental approvals, consents, permits, licences, authorities or allocations, or any other cause whether of the kind specifically set out above or otherwise which is not reasonably within the control of the party relying on the Uncontrolled Event;

"Unit" means an undivided interest in the Scheme Property created and issued under this Constitution;

"Unit Holder Liability" means the liability of the Scheme to the Members for their undivided interest in the Scheme Property;

"Unit Holding" means the number of Units in the Scheme held by a Member as evidenced in the Register of Unit holders;

"Unit Holding Statement" means a statement issued by the RE to a Member pursuant to clause 5.9;

"Valuation Date" means the date which is the last day of each month or any date during each month at the RE's discretion or the date on which the RE determines there has been a material change in the value of the Scheme Property;

"Withdrawal Notice" means:

- (a) for a Savings Plan Investment, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE, provided that only 4 such notices may be given within any 12 month period, and any notices in excess of this number will not be valid unless otherwise determined by the RE in its discretion;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, a notice in writing given by a Member and received by the RE on or after the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE;
- (c) for all investments for an Investment Term, a notice in writing given by a Member and received by the RE before the start of the relevant Withdrawal Notice Period stating the Member's name, the number of Units the Member wishes to have redeemed, and any other information reasonably required by the RE,

and provided that if a notice in writing as referred to above is not received before 12 noon on a Business Day, the notice will be deemed to be received on

the next Business Day;

"Withdrawal Notice Period" means:

- (a) for a Savings Plan Investment by a Member, the period commencing 1 Business Day after the first 12 month period of the Savings Plan Investment has expired, and continuing throughout the term of the Savings Plan Investment;
- (b) for any investment that is not a Savings Plan Investment nor for an Investment Term, any period when the Member owns Units; or
- (c) for all investments for an Investment Term, the period commencing 5 Business Days before the expiry of the relevant Investment Term (and where an Investment Term is created by the rollover of an existing Investment, means the period commencing 5 Business Days before the expiry of that subsequent Investment Term); or
- (d) any other time period as determined by the RE.

"Withdrawal Price" means the price at which a Unit is redeemed calculated in accordance with Clause 8.

1.2 Interpretation

In this Constitution, unless the context otherwise requires:

- (a) headings and underlining are for convenience only and do not affect the interpretation of this Constitution;
- (b) words importing the singular include the plural and vice versa;
- (c) words importing a gender include any gender;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this Constitution have a corresponding meaning;
- (e) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (f) a reference to any thing includes a part of that thing;
- (g) a reference to a part, clause, party, annexure, exhibit or schedule is a reference to a part and clause of, and a party, annexure exhibit and schedule to, this Constitution;
- (h) a reference to any statute, regulation, proclamation, ordinance or by-law includes all statutes, regulations, proclamations, ordinances or by-laws amending, consolidating or replacing it, and a reference to a statute includes all regulations, proclamations, ordinances and by-laws issued under that statute;
- (i) a reference to a document includes all amendments or supplements to,

or replacements or novations of, that document;

- (j) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the preceding Business Day except that any amount payable on demand where the demand is made on a day which is not a Business Day must be paid on the next succeeding Business Day;
- (k) a reference to an agreement includes an undertaking, deed, agreement or legally enforceable arrangement or understanding whether or not in writing;
- (l) a reference to a document includes any agreement in writing, or any statement, notice, deed, instrument or other document of any kind;
- (m) a reference to a body (including, without limitation, an institute, association or authority), whether statutory or not:
 - (i) which ceases to exist; or
 - (ii) whose powers or functions are transferred to another body;is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (n) a reference to any date means any time up to 5.00 pm (Queensland time) on that date; and
- (o) a reference to dealing with a Unit includes any subscription, withdrawal, sale, assignment, encumbrance, or other disposition whether by act or omission and whether affecting the legal or equitable interest in the Unit.

1.3 Accounting Standards

In respect of any accounting practice relevant to this Constitution, the following accounting standards apply as if the Scheme were a company in accordance with:

- (a) the accounting standards required under the Law; and
- (b) If no accounting standard applies under clause 1.3(a), the accounting practice determined by the RE.

2. ESTABLISHMENT OF TRUST

2.1 Trustee

The RE continues to act as trustee of the Scheme.

s501FC(2)

2.2 Role of Trustee

The RE recognises that it continues to hold the Scheme Property on trust for the Members.

s501FB(2)

2.3 Appointment of Custodian

- (a) The RE has appointed the Custodian as agent to hold the Scheme Property on behalf of the RE.

(b) The Custodian holds the Scheme Property as agent of the RE for the term of the Scheme on terms and conditions as detailed in the Custody Agreement.

2.4 Name of Trust

The name of the trust and Scheme is the LM First Mortgage Income Fund or any other name that the RE may determine from time to time.

2.5 Initial Issue

The Scheme commenced at such time after the Commencement Date when LMM or its nominee paid \$100.00 to the RE to establish the Scheme Property. The RE issued to LMM or its nominee 100 Units in return for that payment.

3. UNITS AND MEMBERS

3.1 Units

The beneficial interest in Scheme Property is divided into Units. 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 Members under this Constitution.

3.2 Classes

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. Such rights and obligations may, but need not be, referred to in the PDS. 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. Without limitation, 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.

3.3 Fractions

Fractions of a Unit may not be issued. When any calculations under this Constitution would result in the issue of a fraction of a Unit, the number of Units to be issued must be rounded down to the nearest whole Unit.

3.4 Equal value

At any time, all the Units in a Class are of equal value unless the units are issued under a Differential Fee Arrangement.

3.5 Interest

A Unit confers an interest in the Scheme Property as a whole. No Unit confers any interest in any particular asset of the Scheme Property.

3.6 Consolidation and re-division

- (a) Subject to clause 3.6(b) the RE may at any time divide the Scheme Property into any number of Units other than the number into which the Scheme Property is for the time being divided.
- (b) A division of a kind referred to in clause 3.6(a) must not change the ratio of Units in a Class registered in the name of any Member to the Units on issue in the Class.

3.7 Rights attaching to Units

- (a) A Member holds a Unit subject to the rights and obligations attaching to that Unit and (if applicable) pursuant to any Differential Fee Arrangement.
- (b) Each Member agrees not to:
 - (i) interfere with any rights or powers of the RE under this Constitution;
 - (ii) purport to exercise a right in respect of the Scheme Property or claim any interest in an asset of the Scheme Property (for example, by lodging a caveat affecting an asset of the Scheme Property); or
 - (iii) require an asset of the Scheme Property to be transferred to the Member.

3.8 Conditions

The RE may impose such conditions on the issue of Units as it determines including that the Member may not give effect to any mortgage, charge, lien, or other encumbrances other than as expressly permitted by the RE.

3.9 Rollover of investments

If the Member has invested for an Investment Term, and fails to complete and return a Withdrawal Notice before the start of the relevant Withdrawal Notice period that applies to the Investment Term, the Member will be deemed to have elected to renew their investment in the Scheme as specified in the PDS. Units issued in respect of such reinvestment must be issued at an Issue Price equal to the Current Unit Value.

4. BINDING ON ALL PARTIES

s601GB

- 4.1 This Constitution is binding on the RE and on all Members of the Scheme as they are constituted from time to time.
- 4.2 By executing the Application Form attached to the PDS the Members as are constituted from time to time agree to be bound by the terms and conditions of this Constitution.

5. ISSUE OF UNITS

s601GA(a)

5.1 Offer and minimum investment

- (a) The RE may at any time offer Units for subscription or sale.

- (b) The Minimum Investment must be lodged with an Application for Units.
- (c) The RE may invite persons to make offers to subscribe for or buy Units.

5.2 Minimum subscription

- (a) The RE may set a Minimum Subscription for the pool of funds of any one currency for the Scheme at its discretion.
- (b) The RE will hold Application Money in a Subscription Account until the Minimum Subscription for the pool of funds is received, subject to clause 5.3.

5.3 Insufficient Application Money received

The RE will return or cause to be returned all Application Money to the persons who paid such Application Money, less any taxes and bank charges payable if:

- (a) insufficient Application Money to meet the Minimum Subscription stipulated in Clause 5.2 is received within a period reasonably determined by the RE, or
- (b) the RE withdraws a PDS (which the RE is entitled to do) before sufficient Application Money is received, or
- (c) the RE does not believe there will be sufficient funds available to achieve the aims of the Scheme contemplated in this Constitution or the PDS.

5.4 Form of Application

- (a) Subject to clause 5.10, each Application for Units must be:
 - (i) made by Application Form attached to a PDS (or as otherwise permitted by the Law); and
 - (ii) be accompanied by Application Moneys as required by any relevant PDS.
- (b) If the Application Form is signed pursuant to a power of attorney, then if requested by the RE, a certified copy of the relevant power of attorney and a declaration that the power of attorney has not been revoked as at the date the Application Form is signed must be provided.

5.5 Acceptance or rejection

The RE may, without giving any reason:

- (a) accept an Application;
- (b) reject an Application; or

(c) reject part of the Application.

5.6 Uncleared funds

Units issued against Application Money in the form of a cheque or other payment order (other than in cleared funds) are void if the cheque or payment order is not subsequently cleared.

5.7 Issue of Units

Units are taken to be issued when:

- (a) the Application Money for the Issue Price is received by the RE; and
- (b) the RE accepts the Application and the Units are entered in the Register, or at such other time as the RE determines.

5.8 Number of Units issued

Subject to Minimum Investment, the number of Units issued at any time in respect of an Application for Units will be calculated as follows:

- (a) by dividing the Application Moneys paid by the applicable Issue Price at that time;
- (b) by rounding down to two decimal places.

5.9 Unit Holding Statement

The evidence of a Member's holding in the Scheme will be the latest extract from the Register as provided from time to time to a Member by the RE in a Unit Holding Statement.

5.10 Additional Applications

Additional Applications for investment in the Scheme by existing Members, not made on an Application Form may be accepted in an Australian dollar investment:

- (a) from a Member;
- (b) as a result of an Application;
- (c) in accordance with an Arrangement for as long as and on condition that it complies with the requirements of the RE and the law or ASIC's policy including any relief granted to the RE from time to time; and
- (d) are in multiples of \$500 each unless the RE, in its sole discretion, agrees to accept a lesser amount as an investment or agrees to accept an amount that is not a multiple of \$500.

5.11 Holding Application Money

All Application Money must be held by the RE (or its agent, the Custodian) on trust for the relevant Applicant in the Subscription Account.

5.12 Interest on Application Money

The RE is not required to account to any Member for any interest earned on Application Money held in the Subscription Account.

5.13 Responsible Entity to return Application Money

Where the RE has rejected (in full or in part) an Application, the relevant Application Money (without interest) must be returned to the Applicant within 14 days.

5.14 Incomplete Application Form

The RE will, on receipt of any Application Money which is not accompanied by a completed Application Form, as soon as practicable return the Application Money to the relevant Applicant, or:

- (a) attempt to obtain the Application Form from the Applicant; and
- (b) bank the Application Money.

5.15 No Application Form received

- (a) If the RE gives any Application Money to the Custodian pursuant to clause 5.11, then the Custodian will hold such Application Money in an account, as custodian for the Applicant in accordance with the Law until the Application Form is received.
- (b) If the RE has not received the Application Form by the time the offer is closed, then the RE must use its best endeavours to return the Application Money, less any taxes and bank charges payable, to the Applicant as soon as practicable.

6. ISSUE PRICE

The issue price of a Unit shall be calculated as follows:

$$\frac{\text{Net Fund Value}}{\text{number of Units on issue}}$$

calculated on the last Valuation Date prior to the date of issue.

7. WITHDRAWAL OF UNITS - WHILE THE SCHEME IS LIQUID

7.1 Withdrawal request - while the Scheme is liquid

- (a) While the Scheme is liquid as defined in S601KA (4) of the Law, 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).

7.2 Withdrawal

- (a) (i) Within 365 days after the end of the Member's Investment Term (where the Member's investment is held for an Investment Term and the Member has given a valid Withdrawal Notice in respect of the Units) or within 365 days after receiving a valid Withdrawal

Notice from the Member (if the Member's investment is not held for an Investment Term or is a Savings Plan Investment), the RE must redeem the relevant Units out of the Scheme Property for the Withdrawal Price.

- (ii) However, the RE must redeem the Units within 180 days after the relevant date (instead of 365 days) where it determines that none of the circumstances referred to in Clause 7.2(b)(i) to (iv) below exist at the time of withdrawal. This Clause 7.2(a) does not limit the independent operation of Clause 7.2(b).
 - (iii) To the extent that the Law does not allow more than one period to be specified in this Constitution for satisfying withdrawal requests while the Scheme is liquid, that one period will be 365 days after the RE receives a valid Withdrawal Notice. Paragraph (ii) above will also apply to the extent permitted by the Law.
 - (iv) The RE may allow redemption of Units within a shorter period than the 365 (or 180) days referred to above, in its absolute discretion, subject to its obligations under the Law.
- (b) The RE may suspend the withdrawal offer as detailed in clause 7.2(a) above for such periods as it determines where:
- (i) the Scheme's cash reserves fall and remain below 5% for ten (10) consecutive Business Days; or
 - (ii) if in any period of (90) days, the RE receives valid net Withdrawal Notices equal to 10% 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 10% 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.
- (c) The RE is not required to process Withdrawal Notices where:
- (i) the person seeking to redeem the Units cannot provide satisfactory evidence of the Member's title or authority to deal with the Units; or
 - (ii) the withdrawal would cause the Member's Unit Holding to fall below the Minimum Investment.

- (d) If the RE allows a Member to withdraw an investment from the Scheme before the end of an investment Term, the RE is also entitled to require the Member to pay an early withdrawal charge equal to the last three months interest distributions paid or payable on the amount being withdrawn (or if the investment has been for less than three months, the RE's estimate of what that amount would have been if the investment had been in place for the last three months), and where an Adviser has been paid an upfront commission in respect of the investment being withdrawn, the RE will also be entitled to require the Member to pay a further early withdrawal charge equal to the upfront commission paid, calculated on a pro-rata basis for the length of time remaining to the end of the investment Term. The RE will also be entitled to require the Member to pay an amount equal to any other fees or charges arising from the early withdrawal (including fees and charges that may be payable to the financial institution which has organised the investment in the relevant currency). These early withdrawal charges will be deducted from the investment being withdrawn, and paid at the time of withdrawal. Such charges will become part of the Scheme Property.
- (e) If the RE allows a Member to withdraw an investment, and that investment has been held for a period in respect of which no Distributable Income has been calculated in respect of that investment, the RE may pay to the Member the amount of Distributable Income that the RE estimates is payable to the member for that period, rather than delay payment to the member until the actual Distributable Income has been calculated.

7.3 Cancellation

- (a) The RE must cancel the number of Units which have been redeemed under clause 7.2 and must not reissue them. Upon cancellation, the RE must immediately:
- (i) remove the name of the Member from the Register in respect of the redeemed Units; and
 - (ii) provide the Member with a new Unit Holding Statement for any unredeemed Units.
- (b) A Unit is cancelled when the Member holding the Unit is paid the Withdrawal Price by the RE.

8. WITHDRAWAL PRICE

The Withdrawal Price of each Unit pursuant to clause 7 shall be calculated as follows:
(Net Fund Value)

(number of Units issued)

calculated on the last Valuation Date prior to the date of withdrawal.

9. TRANSFER OF UNITS

9.1 Transferability of Units

- (a) Subject to this 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.
- (b) A transferor of Units remains the holder of the Units transferred until the transfer is recorded on the Register.

9.2 Registration of Transfers

- (a) The following documents must be lodged for registration on the Register at the registered office of the RE or the location of this Register:
 - (i) the instrument of transfer; and
 - (ii) any other information that the RE may require to establish the transferor's right to transfer the Units.
- (b) On compliance with clause 9.2(a), the RE will, subject to the powers of the RE to refuse registration, record on the Register the transferee as a Member.

9.3 Where registration may be refused

Where permitted to do so by Law or this Constitution, the RE may refuse to register any transfer of Units.

9.4 Where registration must be refused

- (a) Registration must be refused if:
 - (i) the RE has notice that the transferor of Units has entered into any borrowing or other form of financial accommodation to provide all or part of the funds to subscribe for or acquire a Unit and has not received confirmation from the financier that the financier consents to the transfer of those Units; or
 - (ii) the transferor has given a power of attorney in favour of the RE and the Custodian in the form set out in an application form accompanying a PDS and the transferee has not executed and provided to the RE a similar form of power of attorney (with such adaptations as are necessary) in favour of the RE and the Custodian;
- (b) In the case of (i) or (ii) above, the RE must refuse to register same and must continue to treat the seller or transferor as the case may be

as the registered holder for all purposes and the purported sale, purchase, disposal or transfer shall be of no effect.

- (c) If the transferee is not a Member the RE must not consent to the registration until the RE is satisfied that the transferee has agreed to be bound by the Constitution.

9.5 Notice of non-registration

If the RE declines to register any transfer of Units, the RE must within 5 Business Days after the transfer was lodged with the RE give to the person who lodged the transfer written notice of, and the reasons for, the decision to decline registration of the transfer.

9.6 Suspension of transfers

The registration of transfers of Units may be suspended at any time and for any period as the RE from time to time decide. However, the aggregate of those periods must not exceed 30 days in any calendar year.

10. TRANSMISSION OF UNITS

10.1 Entitlement to Units on death

- (a) If a Member dies:
 - (i) the survivor or survivors, where the Member was a joint holder; and
 - (ii) the legal personal representatives of the deceased, where the Member was a sole holder,will be the only persons recognised by the RE as having any title to the Member's interest in the Units.
- (b) The RE may require evidence of a Member's death as it thinks fit.
- (c) This clause does not release the estate of the deceased joint Member from any liability in respect of a Unit that had been jointly held by the Member with other persons.

10.2 Registration of persons entitled

- (a) Subject to the Bankruptcy Act 1966 and to the production of any information that is properly required by the RE, a person becoming entitled to a Unit in consequence of the death or bankruptcy (or other legal disability) of a Member may elect to:
 - (i) be registered personally as a Member; or
 - (ii) have another person registered as the Member.
- (b) All the limitations, restrictions and provisions of this Constitution relating to:
 - (i) the right to transfer; and
 - (ii) the registration of a transfer;

for Units apply to any relevant transfer as if the death or bankruptcy or legal disability of the Unit Member had not occurred and the notice or transfer were a transfer signed by that Member.

10.3 Distributions and other rights

- (a) If a Member dies or suffers a legal disability, the Member's legal personal representative or the trustee of the Member's estate (as the case may be) is, on the production of all information as is properly required by the RE, entitled to the same distributions, entitlements and other advantages and to the same rights (whether in relation to meetings of the Scheme or to voting or otherwise) as the Member would have been entitled to if the Member had not died or suffered a legal disability.
- (b) Where two or more persons are jointly entitled to any Unit as a result of the death of a Member, they will, for the purposes of this Constitution, be taken to be joint holders of the Unit.

11. DISTRIBUTABLE INCOME

11.1 Income of the Scheme

The Income of the Scheme for each Financial Year will be determined in accordance with applicable Accounting Standards.

11.2 Expenses and provisions of the Scheme

For each Financial Year:

- (a) the expenses of the Scheme will be determined in accordance with the applicable Accounting Standards; and
- (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 the applicable Accounting Standards including, but not limited to, provisions for income equalisation and capital losses.

11.3 Distributable Income

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.

12. DISTRIBUTIONS

12.1 Distribution Period

- (a) The Distribution Period is one calendar month for Australian dollar investments or as otherwise determined by the RE in its absolute

discretion.

- (b) The Distribution Period is the Investment Term of the investment for non-Australian dollar investments or as otherwise determined by the RE in its absolute discretion.

12.2 Distributions

The RE must distribute the Distributable Income relating to each Distribution Period within 21 days of the end of each Distribution Period.

12.3 Present entitlement

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.

12.4 Capital distributions

The RE may distribute 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.

12.5 Grossed up Tax amounts

Subject to any rights, obligations and restrictions attaching to any particular Unit or Class, the grossed up amount under the Tax Act in relation to Tax credits or franking rebates is taken to be distributed to Unit Members in proportion to the Distributable Income for a Distribution Period as the case may be, which is referable to a dividend or other income to which they are presently entitled.

12.6 Reinvestment of Distributable income

- (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.
- (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.
- (c) The RE may determine that unless the Member specifically directs otherwise they will be deemed to have accepted the reinvestment offer.
- (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.

13. NATURE OF RE POWERS

- s601GA(1)(b) 13.1 The RE has all the powers:
- (a) of a natural person to invest and borrow on security of the Scheme Property;
 - (b) in respect of the Scheme and the Scheme Property that it is possible under the Law to confer on a RE and on a Trustee;
 - (c) as though it were the absolute owner of the Scheme Property and acting in its personal capacity; or
 - (d) necessary for fulfilling its obligations under this Constitution and under the Law.
- s601GA(3) 13.2 The RE must only invest Members' funds in:
- (a) subject to clause 13.3 and 13.3A, mortgage investments provided that:
 - (i) all mortgages are secured over property and the amount which may be advanced to a Borrower does not exceed an LVR of 75% of the value of the security property on initial settlement.
 - (ii) the type of real estate offered for security is acceptable to the RE;
 - (iii) the value of the property offered as security has been established in accordance with the Mortgage Lending Valuation Policy of the RE ;
 - (b) other mortgage backed schemes in accordance with this clause and the RE's compliance standards;
 - (c) a range of interest bearing investments backed by Australian Banks, building societies, State or Federal governments, or foreign banks as approved by the RE.
 - (d) Authorised Investments.
- s601GA(3) 13.3 Notwithstanding the provisions of clause 13.2(a), after a loan has settled and where the RE considers it is in the best interests of the Members of the Scheme, the RE may approve an LVR not to exceed 85% of the value of the security property.
- 13.3A Notwithstanding any other provision of this Constitution, the LVR of a loan that is in default may exceed 85%
- s601GA(3) 13.4 Whenever a loan of Scheme funds involves a Development Loan, the RE shall ensure it has included amongst its officers or employees persons with relevant project management experience who are competent to manage loans of this kind.
- s601GA(3) 13.5 To the extent allowed by law:

- (a) any restriction or prohibition imposed upon the RE in relation to the investment from time to time of the Scheme Property or any part thereof is hereby excluded from the obligations imposed.
 - (b) without derogating from the generality of the foregoing this exclusion specifically applies to any "Prudent Person Rule" or the like which may be implied by any future enactment of legislation.
- s601GA(3) 13.6 To the extent allowed by law:
- (a) the RE may borrow or raise money with or without security over the Scheme Property or any part of it on any terms, including any rate of interest and any fees and expenses as the RE thinks fit;
 - (b) the RE may deal with any property to exercise all the powers of a mortgagee pursuant to the mortgage terms and conditions.
- s601GA(3) 13.7 The RE must direct the Custodian to deal with the Scheme Property in accordance with this Constitution.

14. COMPLAINTS PROCEDURES

- s601GA(1)(c) 14.1 If a Member has a complaint they should generally first contact their Adviser. If the Adviser is unavailable, unwilling, or unable to assist, or if the Member wishes to directly contact the RE, and the complaint relates to the Fund or the RE, then the Member should contact the RE at the registered office of the RE. Complaints may be made in writing or by telephone.
- 14.2 The RE may (if applicable) contact the Adviser for further background information and attempt to mediate a satisfactory resolution of the complaint or escalate as necessary. The RE has 30 days to respond to the complaint once it is received. The RE must attempt to resolve the complaint within a satisfactory time period as determined by the nature of the complaint and the Member's response.
- 14.3 The Complaints Officer of the RE will take responsibility for formal complaints and record them in the Complaints Register. In acknowledging or resolving formal complaints, the RE must make or cause to be made, a written response including:-
- (a) the name, title and contact details of the person actually handling the complaint;
 - (b) a summary of the RE's understanding of the complaint;
 - (c) details of the RE's offer for resolution of the complaint and relevant time frame;
 - (d) where the complaint is not fully dealt with in the letter an estimate of time required for the RE to resolve the complaint.
- 14.4 Full details of each formal complaint and resolution thereof must be recorded in

the Complaints Register including:-

- (a) the person responsible for resolving the complaint;
- (b) the name of the Member making the complaint;
- (c) the nature of the complaint;
- (d) the product service or department in respect of which the complaint was made;
- (e) the actual time required to resolve the complaint;
- (f) the actual resolution of the complaint;
- (g) recommendations, if any, for changes to products disclosures systems or processes to ensure similar complaints do not arise in the future.

14.5 The Complaints Register should be reviewed by the Complaints Manager of the RE as part of an ongoing review process to determine whether recommendations for change arising from resolved complaints have been effectively incorporated in the compliance program.

14.6 Where the RE believes it has either resolved the complaint, or it has not resolved the complaint but believes it can do nothing more to satisfy the complainant, and the Member feels their complaint has still not been satisfactorily resolved, the complainant must be referred to the FICS for mediation. The FICS adopts a three stage approach in resolving complaints as follows:-

- (a) stage 1: initial opportunity for Member to resolve complaints;
- (b) stage 2: complaints review, investigation and conciliation;
- (c) stage 3: independent determination of complaints by adjudicator.

The full terms of reference for the FICS are held by the RE.

14.7 If a complaint cannot be resolved to the satisfaction of the Member by the RE or the FICS then the complainant Member may:-

- (a) refer the matter to arbitration or the courts; or
- (b) take whatever other action is open to the complainant Member under the general law.

14.8 The RE must disclose the details of its complaints procedure to all investors.

15. TERM OF TRUST

The Scheme begins on the Commencement Date and is to be wound up on the earlier to occur of:

- (a) the date which is eighty years from the Commencement Date; and
- (b) any earlier date which the RE, in its absolute discretion may appoint as the Vesting Date.

16. WINDING UP THE SCHEME

16.1 The Scheme shall only be wound up in accordance with the Law and this

Constitution.

- 16.2 The RE must wind up the Scheme in the following circumstances:-
- s601NE(1)(a) (a) if the term of the Scheme as detailed in this Constitution has expired;
 - s601NE(1)(b) (b) the Members pass an extraordinary resolution directing the RE to wind up the Scheme;
 - s601NE(1)(c) (c) the Court makes an order directing the RE to wind up the Scheme pursuant to the Law and in particular pursuant to section 601FQ(5) and section 601ND;
 - s601NE(1)(d) (d) the Members pass an extraordinary resolution to remove the RE but do not at the same time pass an extraordinary resolution choosing a company to be the new RE that consents to becoming the Scheme's RE;
- s601NC(1) 16.3 (a) If the RE considers that the purpose of the Scheme:
- (i) has been accomplished; or
 - (ii) cannot be accomplished,
- it may take steps to wind up the Scheme.
- (b) If the RE wishes to wind up the Scheme pursuant to clause 16.3(a), the RE must give to the Members of the Scheme and to the ASIC a notice in writing;
- (i) explaining the proposal to wind up the Scheme, including explaining how the Scheme's purpose has been accomplished or why that purpose cannot be accomplished; and
 - (ii) informing the Members of their rights to take action under Division 1 of Part 2G.4 of the Law for the calling of a Members' meeting to consider the proposed winding up of the Scheme and to vote on a special resolution Members propose about the winding up of the Scheme; and
 - (iii) informing the Members that the RE is permitted to wind up the Scheme unless a meeting is called to consider the proposed winding up of the Scheme within 28 days of the RE giving the notice to the Members;
- (c) if no meeting is called within that 28 days to consider the proposed winding up, the RE may wind up the Scheme.
- s601NE(2) 16.4 (a) The RE may wind up the Scheme in accordance with this Constitution and any orders under S601NF(2) of the Law if the RE is permitted by S601NC(3) of the Law to wind up the Scheme.
- s601NF (3) (b) An order to wind up the Scheme pursuant to s601ND (1) or s601NF (1) or (2) of the Law may be made on the application of:

- (i) the RE; or
- (ii) a director of the RE; or
- (iii) a Member of the Scheme; or
- (iv) the ASIC.

- s601NE(3) 16.5 The RE shall not accept any further Applications for Units in the Scheme or make any further loans from the Scheme Property at a time after the RE has become obliged to ensure the Scheme is wound up or after the Scheme has started to be wound up.
- 16.6 The RE shall manage the Scheme until such time as all winding up procedures have been completed.
- 16.7 Subject 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 rights or restrictions attached to any Unit, distribute the net proceeds of realisation among the Members in the same proportion specified in Clause 12.4;
 - (d) The Members must pay the costs and expenses of a distribution of assets under clause 16.7(c) in the same proportion specified in clause 12.4.
 - (e) The RE may postpone the realisation of the Scheme Property for as long as it thinks fit and is not liable for any loss or damage attributable to the postponement.
 - (f) The RE may retain for as long as it thinks fit any part of the Scheme Property which in its opinion may be required to meet any actual or contingent liability of the Scheme.
 - (g) The RE must distribute among the Members in accordance with clause 16.7 anything retained under clause 16.7(f) which is subsequently not required.
- s601NG 16.8 If on completion of the winding up of a registered Scheme, the RE or such other person who may be winding up the Scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the Scheme Property the RE or person winding up the Scheme must, as soon as practicable, pay the money or transfer the property to the

ASIC to be dealt with pursuant to Part 9.7 of the Law.

- §601EE 16.9 If at any time the Scheme is operated while it is unregistered the following may apply to the Court to have the Scheme wound up:
- (a) The ASIC
 - (b) The RE
 - (c) A Member of the Scheme
- 16.10 The RE shall arrange for an Auditor to audit the final accounts of the Scheme after the Scheme is wound up.

17. VALUE OF THE SCHEME FUND

17.1 Valuation of the Scheme Property

The RE may cause the Scheme Property to be valued at any time in accordance with the Scheme Valuation Policy of the RE.

17.2 Valuation if required

The RE must cause the Scheme Property or any asset of the Scheme Property to be valued if required by ASIC or under the Law and the valuation must be undertaken in accordance with those requirements.

17.3 Determination of Net Fund Value

The RE may determine the Net Fund Value at any time in its discretion, including more than once on each day.

18. FEES, TAXES, COSTS AND EXPENSES

§601GA(2) **18.1 Taxes:**

The RE may use the Scheme Property to pay any Tax or other obligation, liability or expense required by any applicable law in relation to:

- (a) this Constitution;
- (b) any amount incurred or payable by the RE;
- (c) a gift or settlement effected by this Constitution;
- (d) the exercise by the RE of any Power; or
- (e) money or investments held by or on behalf of the RE under this Constitution.

§601GA(2) **18.2 Payment of Debts:**

The RE may set aside any money from the Scheme Property which, in the RE's opinion, is sufficient to meet any present or future obligation of the Scheme.

§601GA(2) **18.3 Fees:**

The RE is entitled to receive out of the Scheme Property, a management fee of up to 5.5 % per annum (inclusive of GST) of the Net Fund Value in relation to the performance of its duties as detailed in this Constitution, the Compliance Plan and the Law. This fee is to be calculated monthly and paid at such times as the RE determines.

- s601GA(2) 18.4 The RE shall be entitled to fees in relation to the following duties:
- (a) the subscription and withdrawal of units;
 - (b) the transfer or transmission of Units;
 - (c) the establishment/loan application fees;
 - (d) the structuring or packaging of loan proposals;
 - (e) loan management;
 - (f) the rollover of a loan facility;
 - (g) due diligence enquiries generally;
 - (h) the sale of real estate or assets of the Scheme Property;
 - (i) the promotion and management of the Scheme;
 - (j) the appointment of the Custodian pursuant to the Custody Agreement;
 - (k) the winding-up of the Scheme;
 - (l) the performance of its duties and obligations pursuant to the Law and this Constitution.

s601GA(2) 18.5 Costs and Expenses

The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties; including:

- (a) Auditor's fees;
- (b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans
- (c) barrister/QC - legal counsel fees;
- (d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;
- (e) valuation fees;
- (f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;
- (g) property report/property consultant fees;
- (h) process servers' fees;
- (i) private investigator fees;
- (j) fees in relation to the marketing and packaging of security properties for sale;
- (k) real estate agent's-sales commissions;
- (l) costs of maintenance of mortgage securities;
- (m) outstanding accounts relating to mortgage securities such as council rates;

- (n) locksmith for changing locks of mortgage securities as appropriate;
- (o) insurance (property and contents);
- (p) removalists for removal of borrower's property as appropriate;
- (q) security guards to attend mortgage securities as appropriate;
- (r) building and/or property inspection report fees - i.e. building, town planning experts and the like;
- (s) all ASIC charges;
- (t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;
- (u) all costs and expenses incurred in producing PDS' and Supplementary PDS' or any other disclosure document required by the Law;
- (v) reasonable costs incurred in protecting or preserving all assets offered as security;
- (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 any agent appointed pursuant to s601FB(2) of the Law;
- (x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;
- (y) fees and expenses of any agent or delegate appointed by the RE;
- (z) bank and government duties and charges on the operation of bank accounts;
- (aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;
- (bb) insurances directly or indirectly protecting the Scheme Property;
- (cc) fees and charges of any regulatory or statutory authority;
- (dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax ("GST")] which are payable by the RE on its own account;
- (ee) costs of printing and postage of cheques, advices, reports, notices and other documents produced during the management of the Scheme;
- (ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;
- (gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;
- (hh) costs of convening and holding meetings of Members;
- (ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

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- (jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;
- (kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601JD of the Law;
- (ll) costs of advertising the availability of funds for lending;
- (mm) brokerage and underwriting fees;
- (nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;
- (oo) If there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property.

- s601GA(2) 18.6 In the event that the RE has not performed its duties, the lack of entitlement to payment of fees pursuant to 18.3 is only in respect of that part of the payment which relates to the specific lack of proper performance on any given matter. Nothing in this clause shall be interpreted to mean that the RE is not entitled to be paid fees and expenses for work properly performed.
- s601GA(2) 18.7 In the event of any dispute regarding the payment of fees and expenses, the RE shall be paid such fees and expenses until the dispute is fully determined. Any overpayment of the RE shall be repaid forthwith upon the identification of the overpayment.
- 18.8 The RE is entitled to recover fees and expenses from the Scheme provided they have been incurred in accordance with this Constitution.
- 18.9 The RE may waive the whole or any part of the remuneration to which it would otherwise be entitled under this clause.
- 18.10 Despite any other provision of this Constitution, the RE may pay a Member's Adviser a fee or fees as directed by the Adviser from time to time. These fees are to be paid out of Scheme Property, as an expense of the Scheme. Where income of the Scheme is not sufficient to pay in full an Adviser's fee and the relevant Member's expected income distribution, the RE may reduce the Adviser's fee and/or the expected income distribution on a pro rata basis, or on any other basis agreed with the Adviser.

19. INDEMNITY AND LIABILITY

s601GA(2) 19.1 The following clauses apply to the extent permitted by law:

- (a) The RE is not liable for any loss or damage to any person (including any Member) arising out of any matter unless, in respect of that matter, it acted both:
 - (i) otherwise than in accordance with this Constitution and its duties; and
 - (ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

In any case the liability of the RE in relation to the Scheme is limited to the Scheme Property, from which the RE is entitled to be, and is in fact, indemnified.

- (b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
 - (i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;
 - (ii) it acted as required by Law; or
 - (iii) it relied in good faith upon any signature, marking or documents.
- (c) In addition to any indemnity under any Law, the RE has a right of indemnity out of the Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust.
- (d) The RE is not liable to account to any Member for any payments made by the RE in good faith to any duly authorised authority of the Commonwealth of Australia or any State or Territory of Australia for taxes or other statutory charges.

20. POWERS OF ATTORNEY

20.1 Each Member by execution of the Application Form or the transfer by which he/she/it acquires Units in the Scheme appoints the RE and the Custodian and any director officer attorney or substitute nominated by either the RE or the Custodian severally for this purpose as its attorney and agent with the right:

- (a) at any time to:
 - (i) sign any document in relation to any subscription and withdrawal agreement;
 - (ii) sign any document in relation to the transfer or transmission of Units;
 - (iii) sign any variation of this Constitution;

- (iv) sign any document required by ASIC to be executed by a Member in respect of the Scheme.
 - (b) at the request in writing of either the RE or the Custodian the Member must execute separate Powers of Attorney in a form reasonably required by the RE or the Custodian appointing the RE and/or the Custodian as its attorney for the purpose of this clause.
 - (c) any attorney may exercise its rights notwithstanding that the exercise of the right constitutes a conflict of interest or duty;
- 20.2 each Member indemnifies and shall keep indemnified any attorney against any liability, loss, cost, expense or damage arising from the lawful exercise of any right by the attorney under the Power of Attorney.
- 21. **TITLE TO SCHEME FUND**
 - 21.1 **Custodian to hold as agent of RE**

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.
- 22. **THE REGISTER**
 - 22.1 **Keeping registers**

The RE must establish and keep a register of Members, and if applicable, the other registers required by the Law.
 - 22.2 **Information in registers**

To the extent applicable, the Register must be kept in accordance with, and contain the information required by the Law. Otherwise, the RE may decide what information is included in the Register. If the Law applies, the RE has the powers conferred under the Law in relation to the Register.
 - 22.3 **Changes**

Every Member must promptly notify the RE of any change of name or address and the RE must alter the Register accordingly.
- 23. **NOTICES**
 - 23.1 A notice or other communication connected with this Constitution has no legal effect unless it is in writing.
 - 23.2 In addition to any other method of service provided by law, the notice must be:
 - (a) sent by post, postage prepaid, to the address for the Member in the RE's register of interests;
 - (b) sent by facsimile to the facsimile number of the Member; or
 - (c) otherwise delivered including via email, at the address of the addressee of the Member as is subsequently notified.
 - 23.3 A notice must be treated as given and received:
 - (a) if sent by post, on the 2nd Business Day (at the address to which it is

posted) after posting;

- (b) if sent by facsimile or electronically before 5.00 p.m. on a Business Day at the place of receipt, on the day it is sent and otherwise on the next Business Day at the place of delivery.

23.4 Despite clause 23.3(ii) a facsimile is not treated as given or received unless at the conclusion of the transmission the sender's facsimile machine issues a transmission report which indicates that the relevant number of pages comprised in the notice have been sent.

23.5 A notice sent or delivered in a manner provided by clause 23.2 must be treated as validly given to and received by the party to which it is addressed even if:

- (a) the addressee has been liquidated or deregistered or is absent from the place at which the notice is delivered or to which it is sent; or
- (b) the notice is returned unclaimed.

23.6 Any notice by a party may be given and may be signed by the solicitor for the party.

23.7 Any notice to a party may be given to the solicitor for the party by any of the means listed in clause 23.2 to the solicitor's business address or facsimile number as the case may be.

24. LIABILITY OF MEMBERS

- (a) The liability of each Member, whether actual, contingent or prospective, is limited to the unpaid Issue Price of his/her/its Units except if the RE and the relevant Member agree otherwise in writing that the liability of a Member may be further limited or waived.
- (b) A creditor or other person claiming against the RE as trustee of the Scheme has no recourse against a Member and no Member is personally liable to indemnify the RE, any creditor of the RE or any person claiming against the RE in respect of any actual, contingent, prospective or other liability of the RE in relation to the Scheme.

25. RETIREMENT AND APPOINTMENT OF RE

- s601FL 25.1 The RE may retire as RE as permitted by s601FM of the Law.
- s601FM 25.2 The RE must retire when required by s601FM of the Law.
- s601FR 25.3 If the RE changes the former RE must comply with s601FR of the Law.
- s601FS 25.4 The rights, obligations and liabilities of a former RE are as detailed in s601FS of the Law.

26. CHANGING THE CONSTITUTION

- s601GC(1) 26.1 This Constitution may be modified or repealed or replaced with a new Constitution:
 - (a) by special resolution of the Members of the Scheme;

or

- (b) by the RE if the RE reasonably considers the change will not adversely affect Members' rights.

26.2 In the event the RE wishes to change the Constitution the RE must:

s601GC(2)

- (a) lodge with the ASIC a copy of the modification or the new Constitution;
- (b) the modification, or repeal and replacement, cannot take effect until the copy has been lodged;

s601GC(3)

- (c) the RE must lodge with the ASIC a consolidated copy of the Scheme's Constitution if the ASIC directs it to do so;

s601GC(4)

26.3 The RE must send a copy of the Scheme's Constitution to a Member of the Scheme within seven (7) days if the Member:

- (a) asks the RE in writing for the copy; and
- (b) pays any fee (up to the prescribed amount) required by the RE.

27. STATEMENTS, ACCOUNTS AND AUDIT

27.1 Appointment of auditors

- (a) The RE must appoint an Auditor to regularly audit the accounts in relation to the Scheme and perform the other duties required of the Scheme's auditors under this Constitution and the Law.
- (b) The RE must appoint an Auditor of the Compliance Plan (as defined in section 601HG of the Law).

27.2 Retirement of auditors

The Scheme Auditor and the Compliance Plan Auditor may each retire or be removed in accordance with the Law.

27.3 Remuneration of Auditor

The remuneration of the Scheme Auditor and Compliance Plan Auditor will each be fixed by the RE.

27.4 Accounts and reports

- (a) The accounts of the Scheme must be kept and prepared by the RE in accordance with applicable Accounting Standards and the Law.
- (b) The RE must report to Members concerning the affairs of the Scheme and their holdings as required by the Law. Subject to the Law, the person preparing a report may determine the form, content and timing of it.

27.5 Audit

The RE will cause:

- (a) the Scheme Auditor to audit and report on the Scheme's accounts;
- (b) the Compliance Plan Auditor to audit and report on the Compliance Plan,

each in the manner required by the Law.

28. **MEETINGS OF MEMBERS**

28.1 **Convening Meetings**

The RE may at any time call and convene a meeting of Members and must call and convene a meeting of Members when required to do so by the Law.

28.2 **Calling and holding meetings**

- §252G(4) (a) A notice of meeting sent by post is taken to be given the day after it is delivered.
- §252R(2) (b) If, at any time, there is only 1 Member of the Scheme, the quorum for a meeting is 1 in all other cases the quorum for a meeting is 2.
- §252R(3) (c) If an individual is attending a meeting as a Member and as a body corporate representative, the RE may in determining whether a quorum is present, count the individual more than once.
- §252W(2) (d) A proxy is not entitled to vote on a show of hands.
- §252W(3) (e) A proxy is entitled to speak and vote for a Member (to the extent allowed by the appointment) even if the Member is present (but only so long as the Member does not speak or vote, as the case may be).
- §252Y(2) (f) An appointment of proxy:
 - (i) is valid even if it does not specify the Member's address; and
 - (ii) may be a standing one.
- §252Z(5) (g) The RE may determine, in relation to a particular meeting or generally, that proxy documents may be received up to any shorter period before the meeting.
- §252K(2) (h) A poll cannot be demanded on any resolution concerning:
 - (i) the election of the chair of a meeting; or
 - (ii) the adjournment of a meeting.

29. **OTHER ACTIVITIES AND OBLIGATIONS OF THE RE**

29.1 Subject to the Law, nothing in this Constitution restricts the RE (or its associates) from:

- (a) dealing with itself (as manager, trustee or responsible entity of another trust or scheme or in another capacity);
- (b) being interested in any contract or transaction with itself (as manager, trustee or responsible entity of another trust or managed investment scheme or in another capacity) or with any Member or retaining for its own benefit profits or benefits derived from any such contract or transaction; or
- (c) acting in the same or similar capacity in relation to any other trust or managed investment scheme.

29.2 All obligations of the RE which might otherwise be implied by law are expressly excluded to the extent permitted by law.

30. **GOVERNING LAW**

This Deed is governed by the laws of the State of Queensland. The RE and the Members submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

31. **ASIC INSTRUMENT**

If relief from the provisions of the Law granted by an ASIC Instrument requires that this Constitution contain certain provisions, then those provisions are taken to be incorporated into this Constitution at all times at which they are required to be included and prevail over any other provisions of this Constitution to the extent of any inconsistency. However, if the relief is granted by Class Order (rather than specifically in relation to the Scheme) then the ASIC Instrument (and the provisions it requires) will only be taken to be incorporated if the RE declares in writing that this is the case.

32. **UNCONTROLLED EVENTS**

To the extent permitted by law, if the RE is prevented from performing its duties under this Constitution or the law due to the occurrence of an Uncontrolled Event then the RE is not liable to the Members and nor is the RE liable for any loss or decrease in value of the Scheme Property.

EXECUTED AS A DEED at the Gold Coast, Queensland:

GIVEN under the Common Seal of LM)

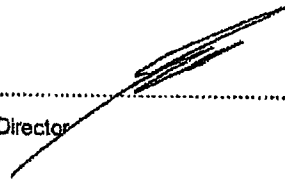
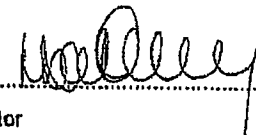
INVESTMENT MANAGEMENT LIMITED ACN 077)

208 461 by authority of a resolution of the Board of) Director

Directors under the hands of two Directors who)

certify that they are the proper officers to affix this)

seal and in the presence of:)


.....

.....
) Director

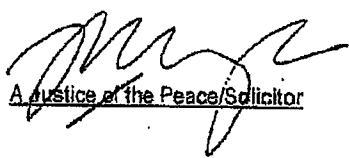

A Justice of the Peace/Solicitor

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Duplicate

SUPREME COURT OF QUEENSLAND

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

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

AND

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

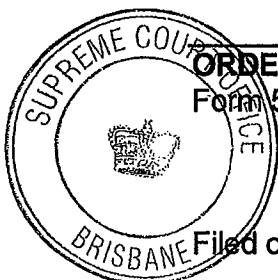
Before: Justice Dalton

Date: 21 August, 2013

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

THE ORDER OF THE COURT IS THAT:

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



**ORDER
Form 59 R.661**

Filed on behalf of the Third Respondent

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

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

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

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

IT IS DIRECTED THAT:

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

Signed: *nee*

Sean Russell

From: Stephen Russell
Sent: Thursday, 25 September 2014 5:15 PM
To: David Schwarz
Subject: LMIM ~20140471~
Attachments: SCR_20130471_413(2).pdf; Sealed Order Dalton J 26.08.2013.pdf; Bruce Submissions and draft order 21.08.2013.pdf; Re Equititrust Ltd QSC11-353.pdf

Dear David

Please see attached letter, and documents referred to therein.

Yours faithfully

RUSSELLS

Stephen Russell

Managing Partner

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RUSSELLS

19 September, 2014

Our Ref: Mr Russell
Your Ref: Mr Schwarz

EMAIL TRANSMISSION

Tucker & Cowen
Solicitors
BRISBANE

email: dtucker@tuckercowen.com.au

Dear Colleagues

**LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") – Role of LMIM in the winding up of the LM First Mortgage Income Fund ("MIF")
Role of Mr Whyte under the order of Dalton J made on 26 August, 2013.**

We refer to the discussions between our respective clients concerning their respective roles, functions and duties, following the appointment of Mr Whyte by Dalton J on 26 August, 2013.

The liquidators of LMIM have instructed us to write to you to explain their position in respect of these matters, in an effort to resolve any further disagreements without incurring the costs of litigation.

A copy of the order accompanies this letter (noting that it is erroneously dated 21 August, 2013). In the course of the application on 21 August, 2014, Mr Shotton proposed a draft order annexed to a written outline. That outline and the draft order for which Mr Shotton argued also accompany this letter.

In the course of argument on 21 August, 2013, the following exchange occurred between counsel for ASIC and her Honour in respect of proposed paragraph 10 in the draft for which Mr Shotton was arguing:-

MR FORREST: ASIC also apprehends that it was your Honour's intention that Mr Whyte 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 - - -

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SCR_20130471_413.docm

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 [sic: Equititrust] 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.

Her Honour's reference to what she recorded in her judgment was to paragraph [121] of her reasons delivered on 8 August, 2013, in which she said, relevantly:-

[121] The provision at s 601ND(1) which allows a Court to direct that the responsible entity winds up a scheme, and the provision at s 601NF(1) which allows a Court to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution do not, to my mind, sit happily together. In particular they give the distinct potential for two separate sets of insolvency practitioners to charge a distressed fund. My view in this case is that Mr Whyte should in substance and effect conduct the winding-up of the fund. In Equititrust that was the view of Applegarth J and he used a mechanism – constituting the person charged with winding the scheme up as receiver – to give that person the necessary powers. It was not contended by Shotton or Trilogy that I should make any different order in this case.

(underlining added)

Her Honour's reference to an order of the kind made in *Re Equititrust* was a reference to the orders made by Applegarth J in *Re Equititrust Ltd* [2011] QSC 353.

In the end result, the applicant Mr Shotton, made an application for relief explicitly set out in paragraphs 8(c) and 10 of the draft order for which he argued on 21 August, 2013, and both applications were refused.

Mr Shotton did not appeal the refusal of his application in that or any other respect.

In paragraph 1 of the order made by Dalton J, her Honour ordered LMIM "to wind up the ... FMIF subject to the orders below". In paragraph 2, her Honour "appointed [Mr Whyte] to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution".

He has not been ordered (or directed) to wind up the Fund.

In essence, Mr Whyte's role, to be gathered from the terms of the order, is to receive the assets and undertaking of the FMIF and to convert them to cash.

LMIM remains trustee and the responsible entity of the FMIF and must wind up the fund subject only to the orders made in respect of Mr Whyte's receivership. Thus, when and if he sells any property, for example, he must remit the funds to the trustee, LMIM.

With that background in mind, we refer to the particular functions and duties of LMIM, under the Act, the Constitution and the order of Dalton J made on 26 August, 2013.

Clause 18.4 of the Constitution

Her Honour rejected the application by Mr Shotton to cede all of the duties in clause 18.4 of the Constitution to Mr Whyte.

Accordingly, save only for sub-paragraph (h) (the sale of real estate or assets of the Scheme property), LMIM remains both entitled and obliged to discharge all of the duties in clause 18.4 – that is subclauses 18.4(a) to (g) and (i) to (l).

Other duties and functions in the Constitution

Similarly, LMIM remains both entitled and obliged to perform and discharge the functions and duties set out in the following clauses in the Constitution:-

- Clause 2.1 – to act as trustee of the Scheme
- Clause 3.2 – to manage the classes of units
- Clause 3.6 – to consolidate or divide the capital of the Scheme
- Part 5 – (to the extent relevant) to issue units
- Part 9 – to deal with the registration of any transfers (which is of course unlikely)
- Part 10 – to maintain and effect transmissions of units where members die or become bankrupt
- Part 11 – to determine the Income of the Scheme for each Financial Year
- Part 12 – to calculate and distribute Distributable Income, and to distribute capital of the Scheme to the Members
- Part 14 – to deal with complaints of Members
- Clause 16.6 – to manage the Scheme until such time as all winding up procedures have been completed (subject to the functions expressly assigned to Mr Whyte in the order, which are essentially to sell property including to take legal proceedings “as is necessary for the winding up of the FMIF in accordance with Clause 16”).
- Subclause 16.7(b) – To pay the liabilities of the RE in its capacity as trustee of the Scheme, including liabilities owed to any Member who is a creditor of the Scheme except where such liability is a “Unit Holder Liability”.
- Subclause 16.7(c) – to distribute the net proceeds of realisation among members in the proportions specified in clause 12.4.
- Subclause 16.7(f) – to retain for as long as it thinks fit any part of the Scheme Property which, in its opinion may be required to meet any actual or contingent liability of the Scheme. This duty and power is subject to Mr Whyte’s obligation to take possession of, and to sell, all of the Scheme property.

-
- Subclause 16.7(g) - to distribute among the members in accordance with clause 16.7 and anything retained under Subclause 16.7(f) which is subsequently not required
 - Clause 16.10 - to arrange for an auditor to audit the final accounts of the Scheme after the Scheme is wound up
 - Part 17 – to obtain valuations of the Scheme Fund as may be required
 - Clause 18.1 – to pay taxes
 - Clause 18.2 – to set aside money from Scheme Property which, in the opinion of LMIM, is sufficient to meet any present or future obligation of the Scheme. Again, this duty and power is subject to Mr Whyte’s obligation to take possession of, and to sell, all of the Scheme property
 - Clause 21.1 - to deal with the Custodian, as agent for LMIM, on the terms and conditions set out in the Custody Agreement
 - Part 22 – to maintain the Register of Members and any other registers required by the law
 - Clause 26.1 – to amend the constitution if LMIM reasonably considers the change will not adversely affect members’ rights. We would add that no amendment to the constitution could be made which would purport to alter the operation of the order of 26 August, 2013
 - Clause 27.1 – to appoint auditors to audit the accounts as may be required (subject to any relaxation of annual audit for which LMIM may wish to apply to ASIC)
 - Clause 27.4 – to keep and prepare the accounts of the Scheme in accordance with applicable Accounting Standards and the Corporations Act. LMIM must also report to members concerning the affairs of the Scheme and their holdings as required by the Corporations Act
 - Part 28 – to call and convene meetings of Members as may be necessary or appropriate

Also, LMIM must continue to perform and discharge the functions and duties prescribed in the *Corporations Act* and the *Corporations Regulation*, except those explicitly dealt with in paragraphs 1, 2 and 3 of the Order.

In addition, LMIM instructs us that the following topics have been the subject of debate with your client Mr Whyte. Consistently with what we have explained above, we identify below the entity (LMIM or Mr Whyte) responsible for the various functions mentioned below:-

1. Loan Management.

LMIM

2. Due diligence enquires.

LMIM, unless such enquiries are made in the course of a sale by Mr Whyte of Scheme Property, in which case, he would either

undertake such enquiries (which is unlikely to be required in a sale) or supervise such enquiries by others.

3. Management of the Scheme

LMIM

4. The winding up of the Scheme.

LMIM (subject to the specific tasks in relation to sale of property delegated to Mr Whyte under the order of 26 August, 2013).

5. Duties under clause 16.7 of the LM FMIF Constitution in relation to the winding up of the scheme, including but not limited to the following:

(a) Realise all scheme property

Mr Whyte

(i) Notifying members.

LMIM

(ii) Managing Scheme until winding up finalised.

LMIM (subject to any specific tasks delegated to Mr Whyte under the order of 26 August, 2013).

(iii) Distributions to members of Scheme Property.

LMIM

(iv) Postpone realisation of scheme property for as long as it thinks fit.

Mr Whyte

(b) Statements, Accounts and Audit:

(i) Appoint Auditors to audit account in relation to the Scheme and the Compliance Plan.

LMIM

(ii) Keep accounts in accordance with Accounting Standards and the Law

LMIM

(iii) Reporting to Members concerning the affairs of the Scheme.

LMIM. (It is to be noted that both in the Act and in the Constitution, there are express obligations of reporting cast on the RE.)

(c) Causing scheme property to be valued, and if required by ASIC or by law

LMIM (although Mr Whyte is empowered to have Scheme Property valued for the purpose of a sale, but not otherwise and, specifically, not for the purpose of any annual or other valuation expressly tasked to the RE under the Constitution or the Act.)

We ask that you take Mr Whyte's instructions and let us know whether there are any areas of difference, with reasons.

We would be happy to discuss these matters with you.

Yours faithfully



Stephen Russell
Managing Partner

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Duplicate

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3383/13

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

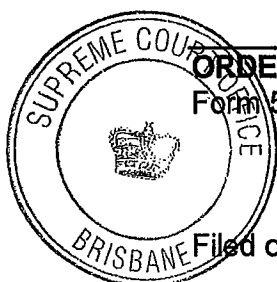
Before: Justice Dalton

Date: 21 August, 2013

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

THE ORDER OF THE COURT IS THAT:

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



ORDER
Form 59 R.661

Filed on behalf of the Third Respondent

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

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

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

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

IT IS DIRECTED THAT:

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

Signed: *nl*

ROGER SHOTTON

v.

**LM INVESTMENTS MANAGEMENT LIMITED
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND**

SUBMISSIONS OF THE APPLICANT AS TO FORM OF ORDER AND COSTS

Proposed Orders

Attached is the proposed Order.

All parties agree as to the form of the Order save for the marked up or highlighted paragraphs.

Proposed paragraph 5 is sought by the administrators. It is unnecessary, and contrary to other orders sought relating to costs. It has the effect of possibly frustrating the access or provision of books and records whilst the administrators assert a lien, which seems contrary to Mr. Park's evidence about co-operation. Paragraphs 13 and 14 are related and are unnecessary. FTI and Mr. Whyte can deal with matters as between themselves, and there is no reason to think that an Order of the Court is necessary to compel co-operation.

Paragraph 8 is necessary (and adopts the Equititrust form of order). For example, it makes clear that Mr. Whyte can deal with FMIF property, such as execute a release of mortgage on behalf of the FMIF. To make the deletions sought by Russells will only create confusion.

Paragraph 8 (c) is necessary to empower Mr. Whyte, as is contemplated in paragraph [121] of the Judgment.

Paragraph 10 (suggested by ASIC) is to make clear that Mr. Whyte has the carriage of the winding up, consistent with paragraph [121] of the Judgment.

There are disputes about costs as well except that no party opposes an order that Mr. Shotton be paid his costs from FMIF on an indemnity basis.

Costs

As to costs, it seems the contentious matters are:

1. Between the Administrators and Trilogy/Bruce's in relation to costs upon the Bruce's Application, as Trilogy seem to want to oppose that, at least in part. Trilogy/Bruce's have not said if they oppose Mr. Shotton on costs of the Bruce's application;
2. The Administrators want costs against ASIC on ASIC's application;

3. The Bruce's want costs from the FMIF (although it is presently unclear on which Applications, and to what extent);
4. The Administrators not having recourse to FMIF for its costs or remuneration of the Applications (and related to that is discharge of paragraph 2 of the 7 May 2013 order restraining the administrators seeking to exercise a right of indemnity out of the FMIF).

Relevantly, Mr. Shotton seeks:

1. An order that he be paid his costs from FMIF on an indemnity basis (which is supported by ASIC and not opposed by others). The order is consistent with types of orders made in these matters (see Equititrust Limited), as the application benefits all members, and costs ought to follow the event (UCPR 681);
2. On the Bruce's OA, an order that 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 filed 15 April 2013, including the reserved costs, to be assessed on the standard basis (draft order attached);
3. The order preventing the Administrators having recourse to FMIF for its costs or remuneration of the Applications or the investor meetings.

The administrators have offered an undertaking not to seek costs or remuneration from FMIF relating to the investor meetings.

Relevant Chronology re Costs

29 April 2013: Mr. Shotton filed his Application ("Shotton Application") with this Court.

1 May 2013: LM filed an Application seeking an adjournment of the hearing date for the Bruce Application and the Shotton Application until a date to be fixed after the FTI meeting on 30 May 2013.

2 May 2013: the Court adjourned the hearing of the Bruce Application and the Shotton Application until 13 May 2013 for hearing, reserved costs, and made some orders for service of material on members of the Fund.

3 May 2013: ASIC filed an Application ("ASIC Application"), also returnable on 13 May 2013.

6 May 2013: LM had the proceedings listed for 7 May 2013 for review on the basis that they were concerned that:

- (a) Mr and Mrs Bruce had notified of an intention to amend the Bruce Application seeking orders for Trilogy (once it was appointed RB) to inspect and take copies of the Fund's books;
- (b) ASIC did not provide LM with any notice that they proposed to bring the ASIC Application;
- (c) The appointment of receivers to the Fund (as proposed by the amended Bruce Application and the ASIC Application) would have a 'deleterious effect' on the member's interests in the Fund;

- (d) If either of the amended Bruce Application or the ASIC Application proceed further, Deutsche Bank AG, a secured creditor of the Fund, will appoint its own receivers and managers to the Fund;
- (e) The continuation of either of the amended Bruce Application or the ASIC Application would add to the length of the hearing and the work required for FTL, in its capacity as administrator for LM, to prepare;
- (f) LM required expert evidence in respect of a valuation of 38 Cavill Avenue, Surfers Paradise property;
- (g) FTL, in its capacity as administrator for LM, have now resolved to wind up the Fund (which it did the day before) and consider it is appropriate to consult with the members of the Fund at the FTL meeting before the Court hears the applications.¹

7 May 2013: The Court made the following relevant orders, that upon FTL, in its capacity as administrator for LM, undertaking not to take any step to wind up the Fund, until further order:

- (a) The hearing for the Bruce Application, the Shotton Application and the ASIC Application be adjourned until 15 July 2013;
- (b) FTL in its capacity as administrator for LM must not seek to exercise any right to indemnity out of the assets of the Fund for these proceedings without leave of the Court;
- (c) Costs reserved.

The Court made directions to facilitate the obtaining of a valuation of 38 Cavill Avenue, Surfers Paradise (which was ultimately not obtained, or even featured in evidence).

30 May 2013: FTL held a meeting of investors at which it was resolved to adjourn the meeting until 13 June 2013.

13 June 2013: FTL held the investors meeting.

Trilogy

Trilogy indemnified the Bruce's, promoted the Application and stood to benefit from the success of the Application. Mr. Paul Wood deposed to the indemnity granted by Trilogy to the Bruce's.² Despite request, the form of the indemnity has not been produced.

In accordance with the principles in *Knight v FP Special Assets Ltd*³, Trilogy ought pay the costs as well.

¹ Affidavit of Stephen Charles Russell filed 7 May 2013 at paragraph 41.

² Affidavit of Paul Wood sworn 6 May 2013 (e-courts doc 29).

³ [1992] HCA 28. This decision in respect of costs against a non-party with a clear interest in the outcome of the matter was recently followed by this court in the matter of *McPhail Investments Pty Ltd v Stumer* [2012] QSC 242.

First Respondents' Costs

Paragraph 12 of the draft Order is proposed.

The general rule is that a trustee is entitled to be indemnified out of the trust estate for his outlays. This is tempered by costs properly incurred (Re Beddoe [1893] 1 Ch547 at 558).

The following observations about the administrators conduct, and the conduct of the litigation, are extracted from the Judgment:-

- (a) Paragraph [51] - *"They wish to use the meeting as a strategy to defeat or damage Trilogy's prospects on its originating application."*
- (b) Paragraph [56] - *"As to the calling of the meeting, it is sufficient to note that the process was technical and somewhat artificial, and that the Administrators (in effect) called the meeting to consider two resolutions they oppose."*
- (c) Paragraph [62] - *"... I find it difficult to see this as consistent with the reality of the First Respondent's interactions with ASIC."*
- (d) Paragraph [65] - *"I think the notice was misleading about costs savings initially and became more so as events unfolded - see the following discussions."*
- (e) Paragraph [74] - *"Until then the information given to members was, in my view, misleading because it implied that the First Respondent had a licence which enabled it to continue to manage the FMIF short of a winding up - see [53(d)] above - and nowhere stated that unless the First Respondent wound up FMIF it was obliged to appoint another responsible entity."*
- (f) Paragraph [77] - *"Why the members were being given information about a legally novel, hypothetical advantage is not clear. I think the clawback information was initially, and remained, misleading in that it implied some real point of distinction between the First Respondent and Trilogy."*
- (g) Paragraph [82] - *"Neither section 601FL or 601FM allowed the meeting which took place on 13 June 2013."*
- (h) Paragraph [82] - *"The desire of the Administrators was to remain as responsibility entity."*
- (i) Paragraph [86] - *"In my view it is plain that calling the meeting was a tactic by the First Respondent which had the aim of seeing off his rival for control of FMIF. Real concerns are raised in my mind by the misleading statements given in the information to members. It is difficult to see any explanation for these matters other than that the First Respondent was pursuing its continuing control of the FMIF in a manner which was at odds with the interests of the members."*

- (j) Paragraph [87] relating to the failure to moderate its position in light of arguments put to it and the objective facts;
- (k) Paragraph [88] – *“Unless Ms Muller was using the word ‘appreciable’ to mean ‘very slight’, I have difficulty accepting that was her genuine belief by the time members had been informed ...”*
- (l) Paragraph [88] – *“That the First Respondent insisted as it did on its position in relation to the meeting when objectively it had become quite untenable to my mind demonstrates that the interest of the members of the scheme were not at the forefront of the thinking of those making the decisions.”*
- (m) Paragraph [89] – *“Nonetheless, in my view the conduct of the First Respondent in this litigation was combative and partisan in a way which I see as reflective of the Administrators acting in their own interests to keep control of the winding up of the FMIF, rather than acting in the interests of the members.”*
- (n) Paragraph [93] – referring to Ms Muller’s evidence ... *“It is hard to see this statement as anything other than unprofessionally robust and partisan when it is compared to Mr Hellen’s conclusion.”*
- (o) Paragraph [94] – *“Solicitors acting for the First Respondent filed an affidavit of over 800 pages – Court documents 16, 17 and 18 – which was of such marginal relevance that it was not referred to in either written or oral submissions by any parties.”*
- (p) Paragraph [94] – *“Further, Court document 52, which itself has over 100 pages of exhibits, is a solicitor’s affidavit which was read on the hearing before me but was little more than combative and querulous commentary on the litigation.”*
- (q) Paragraph [95] – *“Ms Muller’s affidavit ... is characterised by the sort of sniping and argumentative passages that one would hope not to find in any affidavit, let alone an affidavit from someone who is an officer of the Court and a trustee acting on behalf of others ...”*
- (r) Paragraph [104] – Mr Park’s evidence was not accepted... *“This was conceded by Mr Park in cross-examination, although he swore to the contrary in his affidavit.”* And again at paragraph [106].
- (s) Paragraph [114] – *“It seemed to me that the Administrators were acting without regard to the interest of those companies in order to propose a situation where there could be no possibility of potential conflicts clouding their continuing control of FMIF.”*
- (t) Paragraph [116] – In response to the submission about the liquidators having a statutory duty *“In my view, the material discussed as to the conduct of the members’ meeting on 13 June 2013; interaction with ASIC, and the conduct of this litigation do give a basis for thinking otherwise.”*
- (u) Paragraph [116] – *“I do not have confidence that the Administrators would adequately identify and deal fairly with conflicts if they were to arise.”*

- (v) Paragraph [117] – *“The Administrators of the First Respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsibility entity and trustee under the Corporations Act. My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct of this litigation. It extends to the point where both Administrators have sworn to matters which they either conceded were wrong in cross-examination ... or in my view are not consonant with reality ... In a winding up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interest of members of the fund in identifying those issues or in dealing with them.”*
- (w) Paragraph [128] – *“I very much doubt that most of the costs of the 13 June 2013 meeting would be approved as necessary and appropriate and I have doubts as to some of the costs of this litigation.”*

In light of those findings, it is submitted that the costs and remuneration responding to the Applications were not properly incurred, and indemnity from the FMIF ought not be permitted.

The Federal Court of Australia, in *Adsett v Berlouis*,⁴ considered what constitutes costs properly incurred “in the sense explained in *Beddoe*” as expenditure that was reasonably and honestly incurred, however where litigation is misconceived or extravagant in the resources applied to it, even where it was otherwise reasonable to be undertaken, the expense incurred is not proper, “notwithstanding that the trustee may have acted honestly throughout”.⁵

The resources applied by the administrators to their resistance of all the Applications were extravagant, and indemnity from the fund ought not be permitted.

Tucker & Cowen

Solicitors for Roger Shotton, Applicant

21 August 2013

⁴ (1992) 37 FCR 201 at pp 22 - 23.

⁵ *Ibid.*, at p. 23.

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.~~

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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 077 268 461 as Responsible Entity of the FMIF by exercising any legal right of LM Investment Management Limited (Administrators Appointed) ACN 077 268 461 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;

- (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

~~(c) perform each 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 601NE(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, Glendé 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 + me to appns

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*Direct that if order in favour 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 amended 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 FMIF.

AND THE COURT DIRECTS THAT

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~~12.13 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.~~

~~13.14 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
Level 15
15 Adelaide Street
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:

SUPREME COURT OF QUEENSLAND

CITATION: *Re Equititrust Ltd* [2011] QSC 353

PARTIES: **EQUITITRUST LTD**
ACN 061 383 944
(applicant)
v
**THE MEMBERS OF THE EQUITITRUST INCOME
FUND AND THE EQUITITRUST PRIORITY CLASS
INCOME FUND**
(respondents)

FILE NO: BS 10478 of 2011

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 23 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 21 and 23 November 2011

JUDGE: Applegarth J

ORDERS: **Orders for two registered schemes to be wound up pursuant to s 601ND of the *Corporations Act 2001 (Cth)*, for the appointment of a person to take responsibility for ensuring that each registered scheme is wound up and for the same person to be appointed as a receiver of the property of each scheme.**

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where company applied to Court for the winding up of two registered schemes of which it was the responsible entity and for the appointment of a temporary responsible entity – where circumstances of urgency exist due to impending lapse of insurance for officers of company – where directors indicated that they would resign upon lapse of insurance – where the administration of the schemes had broken down and the schemes’ purposes could no longer be accomplished – where the company was in breach of the *Corporations Act 2001 (Cth)* and of conditions of its financial services licence – whether the Court had jurisdiction to appoint a temporary responsible entity – whether the Court should order the winding up of the schemes – whether the Court should appoint a receiver to the property of each scheme

Corporations Act 2001 (Cth) s 601FA, s 601FN, s 601FP, 601ND, s 601NF, s 1101B

Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd [2001] WASC 339 cited
Capelli v Shepard (2010) 264 ALR 167; [2010] VSCA 2 cited
Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd [1992] 2 Qd R 76 cited
Joye v Beach Petroleum N.L. (1996) 67 FCR 275 cited
Mier v FN Management Pty Ltd [2006] 1 Qd R 339; [2005] QCA 408 discussed
Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2) [2008] WASC 232 cited
Re Rubicon Asset Management Ltd (2009) 74 ACSR 346; [2009] NSWSC 1068 discussed
Re Stacks Managed Investments Ltd (2005) 219 ALR 532; [2005] NSWSC 753 discussed
Westfield Management Ltd v AMP Capital Nominees Ltd [2011] NSWSC 1015 cited
Yunghanns v Candoora No. 19 Pty Ltd (No 2) (2000) 35 ACSR 34; [2000] VSC 300 cited

- COUNSEL: P L O'Shea SC and J W Peden for the applicant
 A S Martin SC and G M Drew for certain members
 D R W Tucker (solicitor) for a member, Tucker SF Pty Ltd
 T P Sullivan SC and S R R Cooper for the Australian Securities and Investments Commission intervening
 D D Keane instructed directly by Lion Advantage Ltd, an applicant for appointment as a temporary responsible entity (21 November 2011)
 J W Peden for the applicant and Mr Mark McIvor (23 November 2011)
- SOLICITORS: Nyst Lawyers for the applicant
 Piper Alderman for certain members
 Tucker & Cowen for Tucker SF Pty Ltd
 Australian Securities and Investments Commission for the intervener
 Nyst Lawyers for Mr Mark McIvor (23 November 2011)

- [1] On Monday, 21 November 2011 I made certain orders following a hearing which was held on short notice and in circumstances of urgency. These are my reasons for making those orders. The circumstances of urgency included the fact that two insurance policies covering officers of Equititrust Ltd (the company) were due to expire at 3.00 pm that day. They were unlikely to be renewed and alternative insurance could not be sourced. In those circumstances, the recently-appointed directors of the company were not prepared to remain on the board and proposed to resign shortly before 3.00 pm.

- [2] By an originating application filed on 15 November 2011 the company sought the following two orders:

- “1. The Equititrust Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001;
2. The Equititrust Priority Class Income Fund be wound up pursuant to section 601ND of the *Corporations Act* (Cth) 2001.”

It also sought an order pursuant to s 601FN of the *Corporations Act* (Cth) 2001 (“the Act”) that:

“Equititrust Limited be replaced as the Responsible Entity of the Equititrust Income Fund and the Equititrust Priority Class Income Fund (‘Funds’) by a temporary Responsible Entity, with that entity to wind-up the Funds and take steps to call a meeting of members to ratify its appointment”.

The company also sought an order pursuant to s 601NF that a committee consisting of Mr Jeff McDermid, Mr Paul Vincent and Mr Nick Combis be appointed to take responsibility for ensuring that the funds are wound up in accordance with their constitutions and that appropriate directions be made to effect that winding up.

- [3] Upon the hearing of the application the company initially sought only an order pursuant to s 601FN of the Act that it be replaced as the responsible entity of the two funds. However, it submitted that if I did not appoint a temporary responsible entity to replace it, I should order that the funds be wound up.
- [4] The Australian Securities and Investments Commission (ASIC) intervened in the proceeding and made an oral application for the appointment of a receiver to the funds pursuant to s 1101B of the Act.

The application for the appointment of a temporary responsible entity

- [5] There was a jurisdictional impediment to the making of an order under s 601FN for the appointment of a temporary responsible entity. That section entitles ASIC or a member of a registered scheme to apply to the Court for the appointment of a temporary responsible entity of a scheme under s 601FP if the scheme “does not have a responsible entity that meets the requirements of s 601FA”. Section 601FA requires the responsible entity of a registered scheme to be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme. At the time of the company’s application and at the time of the hearing it met both of these requirements. The fact that it was in breach of the terms of its financial services licence and faced the prospect of having that licence terminated or suspended did not alter the fact that it still held its licence.
- [6] This jurisdictional impediment was, in part, the result of the company seeking from ASIC and obtaining an adjournment until 22 November 2011 of a hearing to show cause why its licence should not be terminated.
- [7] Counsel for ASIC helpfully drew my attention to Regulation 5C.2.02 of the *Corporations Regulations* 2001 (Cth), although the company did not make any

application under that regulation. For the reasons given by ASIC, it is questionable whether that regulation provides a source of power for the Court to appoint a temporary responsible entity other than in the circumstances provided for in s 601FL or s 601FN.

- [8] In the result, the Court's power to appoint a temporary responsible entity upon an application under s 601FN was not invoked.
- [9] This makes it unnecessary to address the question of whether the appointment of a temporary responsible entity was in the interests of the members, and a contentious issue as to whether the replacement of the company by such an entity would result in a reconversion of subordinated units held by the company in its own right, and a decrease in the value of units held by other members.

The application under s 601ND to wind up the funds

- [10] The company submitted that if I did not appoint a temporary responsible entity to replace it as the responsible entity for each fund, then I should make the orders sought in paragraphs 1 and 2 of its originating application for each of the funds to be wound up pursuant to s 601ND. ASIC supported this application. So did a member of the Equititrust Income Fund, Tucker SF Pty Ltd. The only opposition to making orders under s 601ND came from seven members for whom Mr Martin SC and Mr Drew of counsel appeared. The basis for that opposition was to enable members to call a meeting and to vote upon a proposal to wind up the Income Fund pursuant to s 601NB of the Act.
- [11] It is necessary to outline certain factual matters by way of background to explain why I reached the conclusion that it was just and equitable to make an order directing the responsible entity to wind up each fund, and why I considered that such an order should be made promptly rather than delayed for some uncertain period to allow the members to vote on a resolution to wind up the Income Fund.
- [12] The company is the responsible entity of three managed schemes, two of which are registered. The third, being the Equititrust Premium Fund ("EPF"), is not registered and is not required to be registered under the Act. The two registered managed investment schemes are known as the Equititrust Income Fund ("EIF") and the Equititrust Priority Class Income Fund ("EPCIF"). The EIF has some 1,400 members and net assets in excess of \$100,000,000. The EPCIF has only five members, all apparently associated with the company's sole shareholder, Mr McIvor. EPCIF holds 13,636,478 units in the EPF.
- [13] As its name suggests, the EIF was intended to be an "income fund" which provided monthly interest payments on most investments and the redemption of capital. Where a member invests for a period of 12 months the entitlement to redemption arises on the anniversary of the allotment of units after a request is made to redeem. The fund no longer achieves its purposes. The fund has been frozen since October 2008 in that no redemptions of units have been permitted since then. Since April 2011 the fund has ceased paying interest to members.
- [14] The company was beset by discord between directors and the company's sole shareholder, Mr McIvor, during 2011. It is unnecessary to describe fully the nature of the discord. An application was brought by the superannuation fund of a former director, Mr Tucker, seeking an order for the winding up of the EIF. The

application was adjourned on the basis of certain undertakings, given by Mr McIvor to the Court, not to seek to appoint any new director or remove any existing director from the board of the company without giving notice to the existing board and to ASIC, and seeking leave of the Court. These undertakings were given on 27 October 2011 in circumstances in which the company had been placed in the hands of a newly appointed board of directors. The newly appointed board comprised Mr Paul Vincent, Mr Jeff McDermid, Mr Troy Bingham and Mr Warwick Powell. Mr Vincent is a Fellow of the Institute of Chartered Accountants, and has 30 years experience as a Chartered Accountant. He and his fellow directors familiarised themselves with the operations of the company and considered how the funds might best be wound up. The new board considered the best realisation strategies.

- [15] On 12 October 2011 a differently constituted board had unanimously resolved:
- (a) that Equititrust Limited as the responsible entity of the Equititrust Income Fund considers that the purpose of the Equititrust Income Fund cannot be accomplished (within the meaning of s 601NC(1) of the *Corporations Act*).
 - (b) that Equititrust Limited as responsible entity of the Equititrust Income Fund take steps to wind up the Equititrust Income Fund within the meaning of s 601NC(1) and in accordance with its constitution.
 - (c) that the chief executive officer prepare notices to give to members of the scheme and to ASIC in accordance with s 601NC(2) of the *Corporations Act*.

A similar resolution was passed the same day in respect of the EPCIF, namely that its purpose cannot be accomplished and that it should be wound up.

- [16] The new board would have preferred to continue with the process of winding up that had been instigated, being a process provided for under s 601NC of the Act. However, the expiry and non-renewal of insurance policies on 21 November 2011 prompted them to have the company apply for winding up orders pursuant to s 601ND.
- [17] Mr Vincent, in an affidavit sworn on 18 November 2011, assessed the approximate financial position of the company as at 31 October 2011 as follows:
- a. ETL [Equititrust Ltd] has assets in its own right worth approximately \$26,498,000;
 - b. ETL has liabilities in its own right in the approximate sum of \$26,470,000;
 - c. ETL has assets that it holds for the EIF in the approximate sum of \$120 million;
 - d. ETL has liabilities in its capacity as responsible entity for the EIF in the approximate sum of \$9 million;
 - e. ETL has therefore net assets in the EIF in the approximate sum of \$111 million;

- f. ETL has liabilities in its capacity as Responsible Entity for EPF in the approximate sum of \$12.5 million;
- g. ETL has assets that it holds for the EPF of approximately \$13 million;
- h. ETL has therefore net assets in the EPF in the approximate sum of \$0.5 million.”

[18] The company has borrowings on its own behalf and also on behalf of the funds. The secured lenders include the Commonwealth Bank, the National Australia Bank and the Bank of Scotland International. The borrowings are secured by various real property mortgages and charges over assets of the company in its own right and also over assets of the funds. The total borrowings are approximately \$17 million, owed by EIF as to \$9 million and by EPF (the unregulated fund) as to \$8 million. The company’s assets and liabilities are more fully summarised in Mr Vincent’s affidavit sworn on 18 November 2011. That affidavit was supplemented by an affidavit sworn on 21 November 2011 which corrected paragraph 6 of the earlier affidavit by stating that the company in its capacity as responsible entity for the EPCIF holds 13,636,478 units in the EPF.

[19] Importantly for present purposes, according to Mr Vincent’s assessment the EIF has net assets of about \$111 million.

[20] Based upon his work as a director since his appointment, Mr Vincent was “clearly of the view that the Funds should be wound up”. His reasons were summarised as follows:

- “a. the Funds have been frozen since October 2008, in that no redemptions of units have been permitted since then;
- b. since April 2011, the Funds have ceased paying interest on the units to members of the Funds;
- c. the disharmony between Mr Tucker and Mr Kennedy on the one hand and Mr McIvor on the other hand over the past 12 months or so, as more fully described in the affidavits of Mr Tucker, Mr Kennedy and Mr McIvor filed in BS9534/2011, has destabilised the Funds to such a degree that it is extremely unlikely that the Funds could regain the possibility of resuming trading;
- d. the vast majority of the loans owed to ETL as responsible entity for the EIF are in default and require intensive management so as to maximise the value realisable from those loans;
- e. as indicated in paragraph 8 of my earlier affidavit, I have received widespread support from members for the winding up and no objections. I am aware of an indication, by correspondence from Piper Alderman as solicitors for a number of members who have mooted a potential class action against ETL and its former directors, that there may be some opposition

to the winding up, but I have not yet seen the details of any such opposition and am accordingly unable to comment on the reasons for such opposition; and

- f. against this background, it is clear to me that the purpose for which each of the EIF and EPCIF were established can not be accomplished.”

- [21] Mr Vincent and his fellow directors reached the conclusion that it is in the best interests of members of the EIF and the EPCIF that each fund be wound up forthwith.
- [22] It is unnecessary to canvass the board’s preference for the appointment of a temporary responsible entity pursuant to s 601FP to enable the winding up to proceed subject to oversight by a committee. Mr Vincent’s affidavit indicated that if a responsible entity was not able to be appointed to replace the company as the responsible entity by Monday, 21 November 2011, then the board recommended that an independent insolvency practitioner be appointed to wind up each fund in accordance with the provisions of its constitution.
- [23] The assessment by Mr Vincent and his fellow-directors of what is in the best interests of members of each fund was undertaken in difficult circumstances. I accepted the considered view of the new board that it was in the best interests of members of each fund that each fund be wound up forthwith.
- [24] As noted, the only opposition to such an order was advanced by counsel on behalf of a small number of members who, according to their Notice of Appearance, hold units in the EIF totalling \$2,433,743.11. Those members also obtained leave to file an application seeking a variety of orders including a declaration that certain notices given pursuant to s 601NC of the Act were invalid and an order pursuant to s 252E(1) of the Act that a meeting of the members of the EIF be called to consider and vote on an extraordinary resolution directing the responsible entity to wind up the EIF. I took into account the submissions made on behalf of these members as to the desirability of allowing the members to meet and consider a resolution to wind up the EIF. I was not in a position to make any assessment of the merit of a submission made by Mr Tucker to the effect that the opposition to an order to wind up the funds forthwith was to achieve some collateral advantage in connection with foreshadowed proceedings against the company and its former officers. I declined these members’ application to adjourn the company’s application and decided to make orders directing that each fund be wound up pursuant to s 601ND because such a course appeared to be in the best interests of members of the funds. Any advantage in allowing the members to vote on a resolution to wind up the EIF at a yet-to-be convened meeting at some uncertain future date was outweighed by the disadvantages associated with delaying orders for the winding up of each fund.
- [25] In addition to the matters supporting a winding up forthwith identified by Mr Vincent is the fact that the board intended to resign prior to 3.00 pm on Monday, 21 November 2011 in the event that the company was unable to obtain insurance coverage. Such a course would leave the company without directors unless and until Mr McIvor obtained a release from the undertakings given in relation to the appointment of directors. There is evidence from former directors of the company that Mr McIvor does not wish the company to properly pursue a winding up of the

funds. There was no proposal for directors who were independent of Mr McIvor to be appointed as directors. The task of winding up the funds, including the recovery of loans upon which there has been default, should be undertaken by an independent person who is appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and any orders made under subsection 601NF(2).

[26] Part 5C.9 of the Act creates a framework for the winding up of registered schemes. In general terms, a registered scheme may be wound up:

- (a) as required by the scheme's constitution pursuant to s 601NA;
- (b) at the direction of members after a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme, as envisaged by s 601NB;
- (c) pursuant to s 601NC, if the scheme's purpose is either accomplished or cannot be accomplished after the responsible entity gives members of the scheme and ASIC the written notice provided for in s 601NC(2) and if no meeting is called within 28 days of the responsible entity giving the notice to the members;
- (d) pursuant to s 601ND, by order of the Court either on the ground that the Court thinks that it is just and equitable to make an order directing the responsible entity to wind up the scheme or because of an unsatisfied judgment against the responsible entity in its capacity as the scheme's responsible entity.

[27] The company resolved in accordance with s 601NC that the funds should be wound up. Winding up under s 601NC could not commence until 25 November 2011 at the earliest, being 28 days after certain notices were given to members. However, a number of members requested a meeting of members to consider the proposed winding up of the EIF and to vote on an extraordinary resolution directing that the fund be wound up pursuant to s 601NB of the Act.

[28] In short, the company's proposal that the funds be wound up pursuant to s 601NC had been overtaken by events, and such a winding up would not commence until some uncertain future date, depending upon the calling of a meeting and the validity of certain notices. A winding up at the direction of members in accordance with s 601NB could not commence until the calling of a members' meeting to consider and vote on such a resolution. The date upon which such a meeting would occur was uncertain and the pending resignation of directors made uncertain the means by which such a meeting would be held. All parties, including ASIC, appeared to agree that the funds should be wound up. I was not persuaded that there was any particular advantage to the members of the fund by a delay in the commencement of the winding up of the funds. The circumstances that had arisen by 21 November 2011 made it appropriate to direct that each fund be wound up forthwith.

[29] Section 601ND(1)(a) authorises the Court to order that the responsible entity of a registered scheme wind up the scheme if the Court thinks it is "just and equitable to make the order". The principles concerning the winding up of companies on the

just and equitable ground inform the application of this provision.¹ A registered scheme may be wound up on the just and equitable ground because the administration and original arrangement have broken down.² The Court may wind up a registered scheme on the just and equitable ground if it is in the public interest to do so.³

[30] The evidence before me, particularly Mr Vincent's evidence, and the parties' submissions persuaded me that it was just and equitable to make orders directing the applicant, as responsible entity, to wind up each fund. The principal reasons for that conclusion are those contained in Mr Vincent's affidavit and which I have earlier quoted. They may be summarised as follows:

- (a) The administration of the funds has broken down and the funds' purposes cannot be accomplished;
- (b) Repayments to investors have been frozen since October 2008 and the funds ceased making monthly interest payments to members on 1 April 2011;
- (c) Disharmony and disputes between members of the board of the company and Mr McIvor prior to the recent appointment of new board members destabilised the administration of the funds with the result that it is extremely unlikely that the funds could resume trading;
- (d) The vast majority of the loans owed to the company as responsible entity for the EIF are in default and require proper management so as to maximise the realisation of funds for the benefit of members;
- (e) The company is in breach of the conditions of its Australian financial services licence, including by a failure to lodge audited accounts, and the company was also likely to be in breach of the conditions of its licence upon the expiry of necessary insurance coverage;
- (f) The members of the recently appointed board were due to resign prior to 3.00 pm on 21 November 2011, whereupon the proper administration of the funds would be jeopardised;
- (g) The appointment of an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2) appears to be in the best interests of members of each fund;
- (h) The winding up of the EIF appears to have received widespread support from members, and no member contended that the funds should not be wound up.

¹ *Capelli v Shepard* (2010) 264 ALR 167 at 190, [2010] VSCA 2 at [104]; *Westfield Management Ltd v AMP Capital Nominees Ltd* [2011] NSWSC 1015 at [124]; *Re PWL Ltd; Ex parte PWL Ltd (formerly Palandri Wines Ltd) (No 2)* [2008] WASC 232 at [44].

² *Capelli v Shepard* (2010) 264 ALR 167 at 186, [2010] VSCA 2 at [86]; *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [63].

³ *Australian Securities and Investments Commission v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [64]; *Re Rubicon Asset Management Ltd* (2009) 74 ACSR 346 at 351, [2009] NSWSC 1068 at [23].

[31] For these reasons, I made orders on the afternoon of Monday, 21 November 2011 pursuant to s 601ND of the Act that:

- (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999; and
- (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999.

Appointment of a person to take responsibility for the winding up of the funds

[32] Section 601ND empowers the Court, by order, to direct the responsible entity to wind up the scheme. Section 601NE provides that the responsible entity must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if, among other things, the Court makes an order directing it to wind up the scheme. Section 601NF provides:

“601NF Other orders about winding up

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme’s constitution are inadequate or impracticable).
- (3) An order under subsection (1) or (2) may be made on the application of
 - (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.”

[33] In the circumstances that presented themselves on 21 November 2011, including the jurisdictional impediment to the appointment of a temporary responsible entity pursuant to s 601FN and the pending resignation of recently appointed members of the company’s board, I considered it necessary to appoint a person to take responsibility for ensuring that each fund was wound up in accordance with its constitution and any orders made under subsection 601NF(2). No party argued against such a course. The pending resignation of the company’s directors made it necessary to appoint an independent person to take responsibility to wind up each fund. The parties accepted that an independent insolvency practitioner be appointed to wind up each fund. Different persons had indicated their preparedness to be

appointed. After hearing submissions I decided to appoint Mr David Whyte, who is an experienced insolvency practitioner.

Powers conferred by s 601NF

[34] Given the time constraints that applied in hearing the application and making appropriate orders on Monday, 21 November 2011, I was not in a position fully to consider that day the extent of the powers conferred upon Mr Whyte by virtue of his appointment to take responsibility for ensuring that each fund is wound up in accordance with its constitution, and the extent of the Court's power to make orders pursuant to s 601NF(2) to facilitate the performance of his responsibility to ensure that each fund is wound up in accordance with its constitution. Having heard submissions, my provisional view was that orders might be made pursuant to s 601NF(2) directing that Mr Whyte act as a receiver of the property held by the company as:

- (a) responsible entity of the EIF; and
- (b) responsible entity of the EPCIF

However, I deferred making any orders pursuant to s 601NF in this regard so that I might consider relevant authorities concerning the power to make such orders pursuant to s 601NF.

Appointment of a receiver pursuant to s 1101B of the Act

[35] Soon after the commencement of the hearing on 21 November 2011, ASIC made an oral application pursuant to s 1101B of the Act for an order appointing a receiver of the property of each fund. The evidence and submissions indicated that the company had contravened the Act and one condition of its Australian financial services licence, and that upon the expiry of its insurance coverage would have contravened another condition. In the circumstances that I have earlier related concerning the need to appoint a person to take responsibility for ensuring that the funds were wound up, and in the absence of a specific order that Mr Whyte act as a receiver of the property of each fund, I made an interim order under s 1101B appointing him:

- (a) a receiver of the property of EIF; and
- (b) a receiver of the property of EPCIF

until 4.00 pm on Wednesday, 23 November 2011 or further earlier order. I was satisfied that such an order would not unfairly prejudice any person, and that such an order was in the interests of the members of each fund.

Further orders

[36] I have now had an opportunity to consider whether in lieu of a further order pursuant to s 1101B, or in addition to an order made under that section, Mr Whyte should be ordered pursuant to s 601NF to act as a receiver of the property of each fund and whether an order should be made as to the powers which he has to act as receiver.

- [37] I have set out the text of s 601NF above. The exercise of the power to appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(2) may arise for consideration in a wide variety of circumstances. For example, the originating application in this matter envisaged the appointment pursuant to s 601NF of a capable and competent temporary responsible entity pursuant to s 601NF to wind up the funds and for a committee consisting of Mr McDermid, Mr Vincent and a partner of Mr Vincent to be appointed to s 601NF to oversee the winding up. In other circumstances a responsible entity will not exist or will not be capable of winding up the registered scheme under the oversight of a person appointed pursuant to s 601NF. Section 601NF(1) contemplates such situations. One such situation is where the responsible entity “has ceased to exist”. As ASIC submits, in such a case, unless a person appointed under s 601NF is empowered to deal with the assets of the scheme, that person will have no means to effect the winding up and the appointment would be rendered meaningless.
- [38] The terms of s 601NF(1) by which the Court may, by order, appoint a person “to take responsibility for ensuring” a registered scheme is wound up may be thought to necessarily carry with the appointment the authority to do such things as are necessary to wind up the registered scheme in accordance with its constitution and any orders made under subsection (2). McPherson SPJ (as his Honour then was) in *Re Crust 'N' Crumb Bakers (Wholesale) Pty Ltd*⁴ stated that:

“Winding up is a process that consists of collecting the assets, realising and reducing them to money, dealing with proofs of creditors by admitting or rejecting them, and distributing the net proceeds, after providing for costs and expenses, to the persons entitled.”

This statement has been approved by the Court of Appeal in *Mier v FN Management Pty Ltd*⁵ and by the Full Court of the Federal Court in *Joye v Beach Petroleum N.L.*⁶ Accordingly, an appointment pursuant to s 601NF may be said itself to authorise the appointed person to cause assets to be collected, realised and other steps taken so as to wind up the scheme in accordance with its constitution and any orders made under s 601NF(2). In general terms, the constitution of the EIF provides for the winding up to involve the conversion of the funds’ assets to money and, after the payment of debts, the payment to members in proportion to the amount of the members’ interests in the scheme.

- [39] Depending upon the circumstances of a particular case, the responsibility for ensuring that a registered scheme is wound up may involve the appointed person ensuring that the responsible entity undertakes these kind of tasks. In other circumstances, for example, because the responsible entity has ceased to exist or is incapable of doing these tasks, the appointed person may need to undertake them or engage someone else to do so.
- [40] The nature and extent of the powers which s 601NF confers upon an appointed person by virtue of his or her appointment is not clear from the terms of the statute. The matter is not clarified or illuminated by the Explanatory Memorandum to the

⁴ [1992] 2 Qd R 76 at 78.

⁵ [2006] 1 Qd R 339 at 347, [2005] QCA 408 at [15].

⁶ (1996) 67 FCR 275 at 287, 290.

Managed Investments Bill 1997 (Cth) which simply stated in respect of proposed s 601NF (which is in identical terms to s 601NF as enacted) that:

“The Court may make other such orders as it sees fit.”

But the section, as enacted, is not in such simple terms. Instead, it provides for the appointment of a person pursuant to s 601NF(1), and goes on to provide that the Court may “by order” give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so. I note that subsection 601NF(2) is not simply a power to give directions.⁷ It contemplates the Court making orders, not simply directions. The orders that might be made under s 601NF(2) are not confined to directions about winding up the scheme in accordance with its constitution. The section does not specify all of the circumstances under which it may be necessary to give directions, but the circumstances include the fact that the provisions in the scheme’s constitution are inadequate or impracticable.

- [41] The terms of s 601NF might be contrasted with the terms of s 601EE(2) in respect of unregistered managed investment schemes. Section 601EE(2) provides in such a case that the Court may make “any orders it considers appropriate for the winding up of the scheme.”
- [42] In *Re Stacks Managed Investments Ltd*,⁸ White J compared s 601NF(2) with s 601EE(2) and considered the authorities in relation to s 601EE(2). Section 601EE(2) was said to empower the Court “to fashion the winding-up process.”⁹ By contrast, s 601NF(2) gave power to make directions about how a registered scheme is to be wound up, where the winding up may already be on foot and should be provided for by the scheme’s constitution.
- [43] In that matter the plaintiff wished to have insolvency practitioners appointed as persons to take responsibility for ensuring that the scheme was wound up. The plaintiff sought the conferral of a wide range of powers on such persons. These included the power to conduct examinations in the same way that liquidators of companies have those powers. White J observed that the plaintiff had adapted the provisions of the *Corporations Act* dealing with the winding up of companies to the circumstances of the scheme. The plaintiff contended that powers could be conferred on the responsible persons, obligations imposed on third parties, and rights of creditors restricted to bring the winding up of the scheme into line with the winding up of companies.¹⁰ His Honour observed that Part 5C.9 provides for the winding up of a registered scheme in accordance with its constitution and any order the Court might make under s 601NF(2). Where the scheme is a trust, what is envisaged by the winding up of a scheme is the realisation of its property, the payment by the responsible entity of liabilities incurred on behalf of the scheme or the retention by it of funds with which to meet its liabilities, the ascertainment of the members’ entitlements, and the distribution of the trust assets to the members in accordance with their entitlements.¹¹ The winding up of a trust was said to be quite a different thing from winding up a company, with the liquidation of a company being a matter governed by statute. His Honour observed that none of the detailed

⁷ cf. the power of a Court to give directions under a provision such as the *Trusts Act 1973*, s 96 (Qld).
⁸ (2005) 219 ALR 532, [2005] NSWSC 753.

⁹ Ibid at 541, [37].

¹⁰ Ibid at 537, [19].

¹¹ Ibid at 542, [42].

provisions of the *Corporations Act* that relate to the liquidation of a company applied to the winding up of a scheme.

- [44] The facts of that case are materially different to this proceeding. The plaintiff in that case sought the appointment of registered liquidators to provide the expertise which the plaintiff did not have in handling administrations. White J observed that the responsible entity was entitled under s 601FB to appoint those persons as its agents, or otherwise engage those persons, to do what the plaintiff was authorised to do in connection with the scheme. There was no necessity for an order under s 601NF(1). His Honour observed that such an order might be necessary if the plaintiff were failing in its duty to wind up the scheme, but there was no suggestion of that.
- [45] As to the proper scope for orders to be made under s 601NF(2), White J noted that the power was limited to giving directions about “how a registered scheme is to be wound up”. It did not authorise the Court “to confer additional powers upon a responsible entity to which third parties would be made subject, or to interfere with the rights which third parties would otherwise enjoy.”¹² His Honour went on to conclude that Parliament deliberately did not apply the regime for the winding up of companies to the winding up of registered schemes and that he did not read the power to give directions in s 601NF(2) “in the wide way for which the plaintiff contends as, in effect, permitting the court, by order, to impose a new legislative regime on the winding up of a particular scheme, and thereby affecting the rights of and imposing duties on third parties.”¹³ I respectfully agree with these conclusions.
- [46] It is necessary, however, for me to consider whether s 601NF authorises the making of orders which are of a different kind.
- [47] In *Re Rubicon Asset Management Ltd*,¹⁴ McDougall J was likewise concerned with the scope of the power to make orders pursuant to s 601NF(2). The matter in issue was a direction that the costs of winding up be borne by the responsible entity. The power to give such a direction was found to exist. The direction was not one which would take away any right that a third party had, or would subject a third party to any form of compulsory process for production of documents or examination. The order sought by the plaintiffs in that case was made. McDougall J noted that in *Re Stacks Managed Investments* White J gave as an example of what was authorised by s 601NF(2) “the making of directions of a kind which would be made in an administration suit for the purpose of settling the entitlements of members”. McDougall J stated that White J was not intending to give an exhaustive account of the width of the statutory power. Like McDougall J and White J, I do not propose to canvass the full extent of the power to give directions under s 601NF(2). My present concern is whether s 601NF authorises the Court by order to give a direction about how a registered scheme is to be wound up by giving a direction that the person to take responsibility for ensuring that the registered scheme is wound up has the power to act as a receiver of the property held by the company as responsible entity of the fund.

¹² Ibid at 544, [52].

¹³ Ibid at 545, [55].

¹⁴ (2009) 74 ACSR 346, [2009] NSWSC 1068.

- [48] In *Mier v FN Management Pty Ltd*¹⁵, Keane JA (as his Honour then was, and with whom McMurdo P and Douglas J agreed) was concerned with the power conferred by s 601EE(2) in relation to the getting in, realisation and distribution of the property of an unregistered managed investment scheme. Because the Act did not explicitly lay down a method for the winding up of an unregistered scheme, Keane JA stated that it must be assumed that, in general, the Court would be guided by analogies with the law relating to the winding up of companies, partnerships and trusts when deciding on the appropriate procedure for the winding up of a scheme. His Honour went on to observe that the best analogy might be thought to be the winding up procedure applicable to a registered scheme and continued:

“Unfortunately for present purposes, the Act, beyond directing that a registered scheme be wound up in accordance with its constitution, also **leaves the detail of the winding up of a registered scheme in the hands of the Court**, which may make such orders as it ‘thinks necessary to do so’.”¹⁶ (emphasis added)

- [49] In *Capelli v Shepard*¹⁷ the Victorian Court of Appeal made a passing comment in the context of a submission that the Court might give directions about whether the scheme property included certain trees. The Court did not think it appropriate to exercise the power under s 601NF(2) as suggested. Its first reason was that the question was not in terms raised in the appeal. Its second reason was that the Court was “not at all confident that a power such as this might be used to affect rights to property.” The Court observed that it “may be that ‘directions as to how a registered scheme is to be wound up’ are limited to procedural rather than substantive matters.” The Court did not develop this point or attempt to define the difference between procedural and substantive matters.
- [50] I am not concerned with an application of the kind that White J rejected in *Re Stacks Managed Investments Ltd*. The application does not seek an order that would give the person appointed pursuant to s 601NF(1) powers in relation to the property of third parties. The application does not seek to adapt and impose detailed provisions dealing with the winding up of companies to the circumstances of a registered scheme.
- [51] I am concerned with a question of whether s 601NF authorises the person who I have appointed to take responsibility for ensuring the funds are wound up to act as a receiver of the property of each fund. There may be doubt as to whether the appointment itself confers such a power. It may be thought necessary to make an order pursuant to s 601NF(2) directing the appointed person to act as receiver since such an order is one which gives directions about “how a registered scheme is to be wound up”. Such an order will be made only if the Court thinks it necessary to do so. For example, the occasion to make such an order may arise if the responsible entity is either unable or unwilling to wind up the scheme, or itself to appoint a person to collect the property of the scheme, realise it and otherwise undertake the winding up of the scheme in accordance with its constitution.
- [52] I am satisfied that in an appropriate case s 601NF(2) gives the Court power, by order, to give directions that the person appointed to take responsibility for ensuring

¹⁵ [2006] 1 Qd R 339, [2005] QCA 408.

¹⁶ Ibid at 348-349, [18] (footnotes omitted).

¹⁷ (2010) 264 ALR 167 at 197, [2010] VSCA 2 at [146].

a registered scheme is wound up act as a receiver of the property of the scheme. The Court may exercise the power if it thinks it necessary to do so and one such circumstance might be if the property of the scheme was in jeopardy because the responsible entity was unable or unwilling to collect the property, realise it and do the other things necessary to wind up the scheme.

- [53] The present application is concerned with property that is held on trust. The person that I have appointed pursuant to s 601NF to take responsibility for ensuring that each fund is wound up in accordance with its constitution is required to ensure that a trust is wound up, but cannot necessarily rely upon the responsible entity itself to perform that task. In the analogous situation of a private trust in which trustees fail to get in trust property, a receiver may be appointed on the application of one of the trustees or of any beneficiary where the appointment is required for the safety of the trust property (the basis of the jurisdiction being the jeopardy of that property).¹⁸ The Court may appoint a receiver of trust property where that is necessary for the well-being of the trust.¹⁹ The Court will appoint a receiver of trust property where that property is in jeopardy through misconduct, waste, improper disposition, breach of a trustee's duty or the unsuitable character of the trustee.²⁰ The case in favour of appointment of a receiver must be a strong one but in assessing the risk to the trust the Court will apply a qualitative judgment.²¹ In my view, the exercise of the power conferred by s 601NF(2) to order that the person who has been appointed to take responsibility for ensuring that the registered scheme is wound up act as a receiver of the scheme's property should be exercised with a similar caution, and only where a strong case is made out for the need for such an order.
- [54] Having now had the opportunity to consider the authorities cited to me at the hearing on 21 November 2011, I consider that s 601NF(2) provides a source of power to make an order giving directions that Mr Whyte act as a receiver of the property of each fund.
- [55] On the morning of Wednesday, 23 November 2011, I heard submissions as to whether it is appropriate to extend Mr Whyte's appointment as a receiver pursuant to s 1101B and to make a similar order pursuant to s 601NF(2). I decided to make such orders and my reasons for doing so follow.
- [56] In this matter the Court has directed the responsible entity, namely the company, to wind up each scheme. In the circumstances earlier outlined, it was necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under subsection 601NF(2).
- [57] The appointment of a receiver of the property of each fund pursuant to s 1101B on ASIC's application and also pursuant to s 601NF(2) was supported by ASIC, and the members of the funds for whom Mr Martin SC and Mr Tucker respectively appeared. On this morning's hearing it was opposed by the company and by Mr McIvor for whom Mr Peden of Counsel appeared. Following the resignation of Mr

¹⁸ *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 47, [2000] VSC 300 at [66]; J.D. Heydon and M.J. Leeming, *Jacobs' Law of Trusts in Australia*, 7th ed (Chatswood: LexisNexis Butterworths, 2006) at 625, [2305].

¹⁹ *Ibid.*

²⁰ *Yunghanns v Candoora No. 19 Pty Ltd (No 2)* (2000) 35 ACSR 34 at 52, [2000] VSC 300 at [84].

²¹ *Ibid.*

Vincent, Mr McDermid, Mr Bingham and Mr Powell at 2.50 pm on Monday, Mr McIvor as sole shareholder of the company appointed himself, his wife Ms Stacey McIvor and Mr Ross Honeyman as directors.

- [58] Whereas on Monday, 21 November, the company did not oppose the appointment of Mr Whyte as a receiver of the property of the funds, it now does so. Mr Peden submitted on its behalf and on behalf of Mr McIvor that there was no need to appoint Mr Whyte as a receiver pursuant to s 1101B(1) or s 601NF(2).
- [59] ASIC made submissions as to why there was such a need. ASIC's submissions were adopted by Mr Martin SC on behalf of the members he represents. Mr Tucker also supported Mr Whyte's appointment as a receiver for essentially the same reasons.
- [60] ASIC placed particular reliance upon the affidavits upon which it previously relied, and on its previous submissions in this proceeding and in proceeding BS9694 of 2011, being a proceeding which it brought against the company. In summary, ASIC submits that there is no dispute that the company is in breach of a condition of its Australian financial services licence—that it hold a minimum amount of net tangible assets (“NTA”)—and has breached provisions of the Act requiring the company to lodge audited financial reports for each fund and audited reports of its compliance with the compliance plans for both funds. The affidavit material upon which ASIC relies, particularly an affidavit of Ms Gentles, and ASIC's written submissions detail the circumstances of these breaches.
- [61] ASIC was sufficiently concerned by the company's breaches of its licence and breaches of sections of the Act that it issued a Notice of Hearing under s 915C of the Act requiring the company to show cause as to why its licence should not be cancelled. Prior to that hearing it brought proceedings against the company, as did Tucker SF Pty Ltd. The material upon which ASIC relied included the matters that I have earlier addressed, and also identified substantial concerns as to how the company operated or proposed to operate each fund, the instability of the company's board and Mr McIvor's ability to change the board of the company at any time and without notice.
- [62] The affidavit of Ms Gentles is a substantial document, and contains material which justified ASIC's concern that Mr McIvor may not deal with the assets of the EIF in the best interests of members. The material relied upon by ASIC that supported its concern in this regard included documents that recorded the concerns of the board of the company in September and October 2011 about Mr McIvor's conduct. This included the then board's view that Mr McIvor “was responsible for making all of the current problem loans”. It also included claims that he had demonstrated extremely poor judgment in recent times (evidenced by emails attached to an affidavit filed in proceedings brought against the company by a borrower that had acquired a unit in the EIF and commenced proceedings to wind up the company). It included the directors' view that Mr McIvor had continued to deal on an unauthorised basis with some borrowers. Mr McIvor was said to be in ongoing conflict with the board and senior management and to have made a series of threats against staff.
- [63] Exhibits to Ms Gentles's affidavit provided evidence from a former chairman, a former director and a former CEO of the company about the exercise by Mr McIvor

of his ability to change the company's personnel and directors without notice and without consultation.

- [64] ASIC sought relief in the proceedings that it brought against the company and submitted on that occasion that such relief was appropriate in circumstances where:
- (a) the company was, by its own admission, in breach of the NTA requirements imposed by its licence;
 - (b) the company had failed, despite specific requests by ASIC, to notify ASIC of its current NTA position;
 - (c) the company had failed to lodge audited financial reports allowing ASIC to make an assessment of its financial position;
 - (d) the company had breached provisions of the Act in failing to lodge audited financial reports and audited reports of its compliance with compliance plans for both funds;
 - (e) the board of the company had been in a state of upheaval, with Mr McIvor apparently focused on ways to develop the assets of EIF, rather than simply proceeding with an orderly winding up.

These matters were said to pose an increased risk that the company might seek to operate the EIF in a manner which was not in the best interests of members.

- [65] On 27 October 2011, Martin J made consent orders in relation to the operation of the EIF and the EPCIF on ASIC's application.
- [66] In the application brought by Tucker SF Pty Ltd there were many allegations of misconduct by Mr McIvor. Mr McIvor's affidavit sworn 26 October 2011 stated that in respect of Mr Tucker's numerous allegations against him:

"I am deliberately not responding to those allegations as I do not consider them relevant to the present application. My response to those matters will occur in the fullness of time. By not responding to them in this affidavit I should not be taken as accepting the correctness of what Mr Tucker has said."

I am not in a position to resolve the allegations made by Mr Tucker against Mr McIvor.

- [67] The concerns raised by ASIC include concerns based upon facts, about which there is no dispute, relating to the company's failure to comply with the conditions of its licence and the requirements of the Act.
- [68] Mr McIvor gave undertakings to the Court on 26 October 2011 that he would not appoint a new director to the board of the company, or remove a director or seek to remove a director from its board without giving seven days' notice to the existing board and to ASIC, and seeking the leave of the Court after expiry of that notice. He also gave an undertaking that he would not seek to interfere with the conduct of the board in its business and the discharge of its responsibilities on the basis that it was clear that he was entitled to put properly documented proposals before the

board for its consideration. Mr McIvor stated that he gave these undertakings to "safeguard any concerns which may be held regarding the independence of the Board and Board members being subject to influence".

- [69] Following the resignation of the directors on Monday, I released Mr McIvor from these undertakings so that the company would have directors. There is no indication that Mr McIvor will not remain a director of the company. There is no indication that he intends to resign as a director and replace himself with other directors who are clearly independent of him. There is no evidence that independent directors would be prepared to assume such a role, and with the expiry of relevant insurance policies there is every reason to suppose that independent directors would not be willing to accept appointment in the absence of the kind of insurance cover that Mr Vincent and his fellow directors were unable to obtain.
- [70] The matters raised by ASIC in the proceedings commenced by it, and also in these proceedings, raise serious concerns about the ability of the company while it remains under Mr McIvor's control, and while he remains a director:
- (a) to operate each fund in a manner that will comply with the Act and the conditions of its Australian financial services licence; and
 - (b) to act in a manner which is in the best interests of the members of each fund.

I am not persuaded that the company will wind up the funds in a manner that is in the best interests of their members. On the contrary, the matters relied upon by ASIC and the members who support the appointment of Mr Whyte as a receiver raise a strong case that the appointment of a receiver is necessary to ensure that each scheme is wound up in accordance with its constitution and any orders made under subsection 601NF(1).

- [71] Whereas the company on Monday did not oppose the making of orders for the appointment of a receiver, it now submits that such an appointment is premature and unfairly prejudicial to the interests of members. It and Mr McIvor submit that I should not assume that there will be problems in the orderly conduct of the winding up that I have ordered, that the company should be given the opportunity to wind up each scheme in accordance with its constitution and that Mr Whyte should only be appointed as a receiver if and when problems arise. They submit that it is not in the interests of members for Mr Whyte as receiver to assert control over the property of the funds and that the property of the funds should be left in the control of the company as a responsible entity, subject to the responsibility that Mr Whyte has by virtue of his appointment pursuant to s 601NF to take responsibility for ensuring that each scheme is wound up in accordance with its constitution.
- [72] I do not accept this submission. I conclude that the best interests of most members of the funds, and the winding up of each scheme in accordance with its constitution, will be served by the appointment of Mr Whyte as a receiver. Such an appointment will avoid confusion and possible disputes over the control of property. Placing the property of the funds under the control of Mr Whyte as a receiver is likely to facilitate its realisation and the winding up of each fund for the benefit of its members. The appointment of Mr Whyte as receiver does not preclude him from having employees of the company (past, present and future) undertake tasks that are required to wind up each fund. As I mentioned more than once during the course of

argument, the best interests of members would appear to be served by relying upon the knowledge, skill and experience of persons who are familiar with the company's affairs, including persons who have taken steps to realise its property in the best interests of members. I am not, however, persuaded that the property of each fund should be left under the control of the company, subject only to the oversight of Mr Whyte by virtue of an appointment under s 601NF(1). The company's history of non-compliance with its statutory obligations, breaches of the conditions of its licence and the evidence pointed to by ASIC in relation to Mr McIvor present a strong case for the appointment of a receiver of each fund's property. The orderly conduct of the winding up of each fund will be facilitated by clarification of the fact that Mr Whyte is not only responsible for ensuring that each scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2), but that he has the power to do so, including the power of a receiver to take control of the property to which he has been appointed receiver and to deal with that property in a way that facilitates the winding up of each fund in a manner, and within a timeframe, that realises the property of each fund in the best interests of members.

- [73] I am not satisfied that Mr Whyte will be able to ensure that each fund is wound up in a timely, efficient and cost-effective manner unless he is appointed as a receiver of the property of each fund. I consider that it is in the interests of the members that the property of the funds be under his control.
- [74] In general, the circumstances that made it necessary to appoint an independent person to take responsibility for ensuring that each fund is wound up in accordance with its constitution and any orders made under s 601NF(2) also persuade me that it is in the best interests of each fund that the same person be appointed as receiver of its property. I am persuaded that the appointment of a receiver is necessary for the well-being of the property which is held on trust by the company, and to ensure that the winding up of each fund occurs in accordance with its constitution and any orders made under s 601NF(2).
- [75] Mr Peden also submitted that I should not appoint Mr Whyte as a receiver because such an order would cut across the legislative framework governing the winding up of a registered scheme. I do not agree with that submission.
- [76] First, insofar as an appointment as receiver pursuant to s 1101B(1) is concerned, the company's contravention of the Act and its contravention of conditions of its Australian financial services licence justify the appointment of a receiver in the circumstances. There is nothing inconsistent with the legislative framework for the winding up of a registered scheme in exercising a power conferred under s 1101B. Such an order may aid the winding up of a registered scheme.
- [77] Secondly, I do not consider that the legislative framework of Part 5C.9 precludes the appointment of a receiver pursuant to s 601NF(2) if it is necessary to do so. I have concluded in the circumstances of this matter that an order giving a direction that Mr Whyte be appointed as receiver of the property is necessary.
- [78] I raised during argument the issue of whether it was necessary for Mr Whyte to be appointed as a receiver pursuant to s 1101B(1) and also pursuant to s 601NF(2) of the Act. However, the parties supporting his appointment favoured such a course, and I intend to make such orders. To the extent that there may be some doubt concerning the extent of the Court's power to appoint a receiver pursuant to

s 601NF(2), I consider that the best interests of the members will be protected by making an order under s 1101B(1) of the Act. Even with an appointment as receiver under s 1101B(1), I think that it is necessary also to appoint Mr Whyte as a receiver pursuant to s 601NF(2). Such an appointment makes clear that one source of his power to act as receiver is s 601NF. It is appropriate that, in carrying out his responsibility for ensuring that the registered scheme is wound up in accordance with its constitution, he have powers that are sourced in the section of the Act that imposes that responsibility. Further, the possibility exists that in the future the Court may rescind or vary the order made under s 1101B, or suspend its operation, pursuant to s 1101B(11). If that occurs Mr Whyte should continue to have the powers and responsibilities associated with appointment as a receiver pursuant to s 601NF(2).

- [79] Mr Whyte's appointment as receiver should not be perceived to be based solely upon the contraventions by the company which attract the operation of s 1101B. It should be clear that Mr Whyte is also being appointed a receiver of the property of each fund because such an appointment is thought necessary to facilitate the performance of his responsibility for ensuring that each scheme is wound up in accordance with its constitution. The winding up of each fund will be facilitated by an order that indicates that one purpose of the appointment of Mr Whyte as receiver of the property of each fund is to facilitate the fund being wound up in accordance with its constitution. Mr Whyte, in discharging his responsibilities which arise by virtue of his appointment under s 601NF(1), will have the power to receive the property of each fund, and the directors of the company, its employees and third parties should understand that a source of the power which he is given to facilitate the responsibility imposed upon him by s 601NF(1) is s 601NF(2). He should have the power of a receiver and the order should state that one source of that power is an order made under s 601NF(2).
- [80] If I had acceded to the submissions made by the company and Mr McIvor this morning and not appointed Mr Whyte as a receiver, then there would have been scope for dispute and disagreement between Mr Whyte and individuals in control of the company, including Mr McIvor, concerning the control of the property of each fund. I consider that the appointment of Mr Whyte as a receiver will reduce the scope for such disputes.
- [81] In short, an order pursuant to s 601NF(2) directing that Mr Whyte be appointed as a receiver of the property of the EIF and a receiver of the property of the EPCIF is in the best interests of members and is necessary to facilitate the winding up of each fund.
- [82] A copy of the orders made by me on 21 November 2011 and a copy of the orders made by me today are set out as annexures to these reasons.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 10478/11

In the matter of **EQUITITRUST LIMITED ACN 061 383 944**

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

ORDER

Before: Justice Applegarth

Date: 21 November 2011

Initiating document: Application filed 15 November 2011, and oral application made by the Australian Securities and Investments Commission on 21 November 2011

THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 601ND (1)(a) of the *Corporations Act 2001* (Cth) (the "Act"):-
 - (a) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Income Fund ARSN 089 079 854, established by Deed Poll dated 9 August 1999 ("EIF");
 - (b) Equititrust Limited ACN 061 383 944 be directed to wind up the Equititrust Priority Class Income Fund ARSN 089 079 729 established by Deed Poll dated 9 August 1999 ("EPCIF").

2. David Whyte ("Mr Whyte") be appointed pursuant to section 601NF(1) of the Act to take responsibility for ensuring that:-
 - (a) the EIF is wound up in accordance with its constitution; and
 - (b) the EPCIF is wound up in accordance with its constitution.

3. Pursuant to section 601NF(2), that Mr Whyte:-
 - (a) have access to the books and records of Equititrust Limited which concern the EIF and the EPCIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in effecting the winding up of the EIF;

- (c) be indemnified out of the assets of the EPCIF in respect of any proper expenses or costs incurred in effecting the winding up of the EPCIF;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration; and
 - (e) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the winding up of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
4. Pursuant to sections 1101B(1) and 1101B(5) of the Act, Mr Whyte be appointed as:-
- (a) a receiver of the property of the EIF; and
 - (b) a receiver of the property of the EPCIF,
- until 4:00pm on Wednesday 23 November 2011, or further earlier order.
5. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Limited or the EIF.
6. That by 4pm on Tuesday 22 November 2011, Equititrust Limited publish on its website (www.equititrust.com.au), in pdf form, by way of notice to members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
7. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with section 601NF(2) of the Act.
8. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this Application, to be assessed on the standard basis, out of the EIF.
9. The oral application of ASIC be adjourned to 10:00am on Wednesday 23 November 2011.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane

NUMBER: 10478/11

IN THE MATTER OF EQUITITRUST LIMITED ACN 061 383 944

Applicant: **EQUITITRUST LIMITED ACN 061 383 944**

AND

Respondents: **THE MEMBERS OF THE EQUITITRUST INCOME FUND
ARSN 089 079 854 AND THE MEMBERS OF THE
EQUITITRUST PRIORITY CLASS INCOME FUND ARSN
089 079 729**

ORDER

Before: Justice Applegarth

Date: 23 November 2011

Initiating document: Application filed 15 November 2011 and Oral Application made 21 November 2011

THE ORDER OF THE COURT IS THAT:

1. Pursuant to s.1101B(1) of the *Corporations Act 2001* (Cth) (*the Act*) David Whyte (*Mr Whyte*) be appointed as:
 - (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and
 - (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).
2. Pursuant to s.601NF(2) of the Act David Whyte (*Mr Whyte*) be appointed as:
 - (a) a receiver of the property of the Equititrust Income Fund (*EIF*); and

- (b) a receiver of the property of the Equititrust Priority Class Income Fund (*EPCIF*).
3. Pursuant to s.1101B(1) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 1 above, the powers set out in s.420 of the Act in addition to the powers set out in s.1101B(8)(a) to (c) of the Act.
 4. Pursuant to s.601NF(2) of the Act, Mr Whyte have, in relation to the property for which he is appointed receiver pursuant to Order 2 above, the powers set out in s.420 of the Act and the powers set out in s.1101B(8)(a) to (c) of the Act.
 5. Pursuant to s.1101B(1) of the Act, Mr Whyte in respect of the appointment made in Order 1 above:
 - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
 - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.
 6. Pursuant to s.601NF(2) of the Act, Mr Whyte in respect of the appointment made in Order 2 above:
 - (a) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EIF;
 - (b) be indemnified out of the assets of the EIF in respect of any proper expenses or costs incurred in acting as receiver of the property of the EPCIF;
 - (c) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EIF in respect of such remuneration;
 - (d) be entitled to claim remuneration in respect of the time spent by him and by any servants or agents of BDO who perform work in the receivership of the property of the EPCIF at rates and amounts to be approved by the Court and be indemnified out of the assets of the EPCIF in respect of such remuneration.

7. That nothing in this Order prejudices the rights of the National Australia Bank Limited, Commonwealth Bank of Australia Limited or Bank of Scotland International Ltd, pursuant to any securities any of them hold over Equititrust Ltd or the property of the EIF.
8. That by 4pm on Thursday 24 November 2011, Equititrust Ltd publish on its website (www.equititrust.com.au), in pdf form, by way of notice to its members of the EIF and EPCIF a copy of this Order, which publication shall be sufficient notice to members of the EIF and EPCIF of this Order.
9. The parties appearing on this application, save for ASIC, be paid their costs of and incidental to this application, to be assessed on the standard basis, out of the EIF.
10. There be general liberty to apply to any person affected by these Orders, including liberty to apply for further directions in accordance with s.601NF(2) of the Act.

Sean Russell

From: Stephen Russell
Sent: Thursday, 13 November 2014 11:11 AM
To: dschwarz@tuckercowen.com.au
Cc: Tim Russell
Subject: FW: LMIM ~20130471~
Attachments: SCR_20130471_413(2).pdf; Sealed Order Dalton J 26.08.2013.pdf; Bruce Submissions and draft order 21.08.2013.pdf; Re Equititrust Ltd QSC11-353.pdf

Importance: High

Dear David

Do you have instructions in relation to this correspondence? My clients are anxious to resolve these issues.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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RussellsLaw.com.au

From: Stephen Russell
Sent: Thursday, 25 September 2014 5:15 PM
To: David Schwarz
Subject: LMIM ~20140471~

Dear David

Please see attached letter, and documents referred to therein.

Yours faithfully

RUSSELLS

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Sean Russell

From: Michelle Voser [mvoser@tuckercowen.com.au] on behalf of David Schwarz [dschwarz@tuckercowen.com.au]
Sent: Thursday, 20 November 2014 10:40 AM
To: Stephen Russell
Cc: David Schwarz
Subject: LM First Mortgage Income Fund
Attachments: Letter to Russells 20 November 2014 re LMIM.pdf; BDO letter to FTI 26082013 (TCS00561438).pdf; BDO letter to FTI 28082013 (TCS00562418).pdf

Dear Colleagues,

We enclose a response, on behalf of Mr David Whyte, to your letter of 19 September, 2014.

SENT ON BEHALF OF DAVID SCHWARZ, PARTNER

Michelle Voser
Personal Assistant

E: mvoser@tuckercowen.com.au

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<<http://www.msi-anz.net/>>

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Tyler Griffin.
Geoff Hancock.

Associates.
Dan Ryan.
Sylvia Lopez.
Marcelle Webster.
Alex Nase.
Emily Anderson.
Daniel Davey.
Nicole Withers.
Dugald Hamilton.
Olivia Roberts.
Ashley Moore.

Our reference: Mr Schwarz

20 November 2014

Your reference:

Mr Stephen Russell
Russells Lawyers
Brisbane

Email srussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM")
LM First Mortgage Income Fund (Receivers & Managers Appointed) (Receiver Appointed) ("FMIF")
Respective roles of LMIM and Mr Whyte in the winding up of the FMIF

We refer to your letter dated 19 September 2014 (but received later, as an attachment to your email of 25 September 2014).

Your letter refers to the respective roles, functions and duties of our respective clients following the appointment of our client, Mr Whyte, by Dalton J. The order dated 21 August 2013, relating to Mr Whyte's appointment, was the result of Her Honour's judgment delivered on 8 August 2014.

We observe that there has already been an exchange of correspondence in which our client's views as to the respective roles of LMIM and Mr Whyte were articulated very shortly after our client's appointment; we refer (by way of example) to:-

1. the letter from Mr Whyte to your client (addressed to Ms Ginette Muller) of 26 August 2013; and
2. the letter from Mr Whyte to Ms Muller of 28 August 2013.

Copies of those letters are enclosed.

As is clear from that correspondence, our client understands the effect of the order providing for his appointment to be that he will, in substance and effect, conduct the winding up of the FMIF; that understanding stems from Her Honour's judgment itself¹. That leaves very little for LMIM to do; indeed, as has been pointed out in correspondence, there is unlikely to be anything for LMIM to do that concerns the FMIF except, perhaps, maintaining its AFSL.

It appears from your letter (on page 2 of 6) that your client considers there to be a continuing substantial role for LMIM as trustee and responsible entity of the FMIF because LMIM has been directed to wind up the fund "*subject only to the orders made in respect of Mr Whyte's receivership.*" It is suggested that Mr Whyte must, after realising any property of the FMIF, remit the proceeds to LMIM.

Such a construction of the order of 21 August 2013 ignores the importance of paragraph 2, to which the direction to LMIM in paragraph 1 is subject². Paragraph 2 appoints Mr Whyte to "*take responsibility for ensuring that the FMIF is wound up in*

¹ paragraph 121 of Her Honour's judgment, which has been recited in your letter

² The direction in paragraph 1 is expressed to be subject to "*the orders below.*"

accordance with its constitution.” Such an order, made under section 601NF(1), is premised upon the Court considering it “*necessary*” for the responsibility for the winding up of the fund to be taken out of the hands of the responsible entity and placed in the hands of another (in this instance, Mr Whyte).

Her Honour found that it was necessary to confer the responsibility for winding up the FMIF upon Mr Whyte. That finding (the foundation of the order appointing Mr Whyte as the person responsible for ensuring the winding up of the FMIF, under paragraph 2) was upheld on appeal. It is implicit in that order that any responsibility for the winding up be removed from the responsible entity.

Our client is not compelled, however, to rely only upon an inference to be drawn from the order – paragraph 121 of Her Honour’s judgment makes it perfectly clear that Mr Whyte is to have the carriage of the winding up, that being the effect of the “*mechanism*” (Her Honour’s language) adopted by Applegarth J in *Equititrust* of appointing the person responsible for ensuring the winding up also as receiver of the fund property. It is plain, we think, from paragraph 121 of Her Honour’s judgment that the effect of the ‘dual appointment’ both under section 601NF(1) and as receiver of the Fund is to dispense with the “*potential for two sets of insolvency practitioners to charge a distressed fund.*” That Her Honour declined to make any order departing from the ‘*Equititrust*-style’ orders is not to the point; no departure was necessary, as those orders had the effect outlined above.

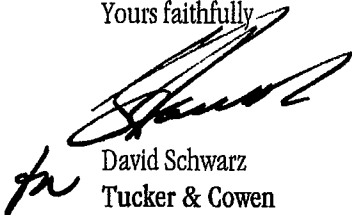
In addition to the intention and effect of the order, the suggestion in your letter that any realisations of FMIF property must be remitted to LMIM as responsible entity also overlooks the fact that proceeds of the realisation of the FMIF assets (in summary, its securities for its loan book) are, themselves, fund property. There is no basis upon which Mr Whyte should be required to remit funds to LMIM; to do so would appear contrary to the substance and intent of his appointment.

Of course, Mr Whyte’s appointment presently remains subject to the appointment of Messrs Hayes and Connelly of McGrathNicol as receivers and managers of the FMIF appointed by Deutsche Bank; Mr Whyte exercises the powers conferred upon him by the order, with the consent of those receivers. That, too, is a reason why Mr Whyte would not remit funds to LMIM. The continuing appointment of those receivers is also, itself, another answer to the suggested allocation of responsibilities and functions insofar as it is suggested that LMIM retains responsibility for matters connected with the management and winding up of the FMIF.

The explanation above responds generally to the contentions contained in your letter. We do note, though, that you have identified various specific roles in your letter which, it is said, remain with LMIM. We are instructed to reply in further detail to your letter, and intend to do so shortly. To the extent, if any, to which this letter does not address matters raised in your letter, our further correspondence will do so. If, having received and considered that correspondence, there remain areas of disagreement between our respective clients as to their respective roles, we anticipate that our client will wish to seek direction from the Court.

Please do not hesitate to contact us if you have any questions.

Yours faithfully



David Schwarz
Tucker & Cowen

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Australia

Ginette Muller
FTI Consulting
22 Market Street
Brisbane QLD 4000

26 August 2013

Dear Madam

**LM FIRST MORTGAGE INCOME FUND (RECEIVER APPOINTED) ('FMIF')
ARSN 089 343 288**

I refer to the final Order of the Court made on 21 August 2013 appointing me to take responsibility to ensure the FMIF is wound up, and appointing me as Receiver of the property of the FMIF.

The effect of the Order is that I will, in substance and effect, conduct the winding up of the Fund. The Judge said as much in the Judgment dated 8 August 2013 (at paragraph 121). Accordingly I would expect an orderly transition of books and records, staff, information and the like and am happy to meet with you to discuss the mechanics of this further.

Obviously, McGrathNicol's appointment by Deutsche Bank takes priority over mine until such time as Deutsche Bank are paid out.

Accordingly, to facilitate compliance with the Court Order, I ask that you:-

1. If not already done so, hand over control of all bank accounts to McGrathNicol, and remove yourself, your partners and your staff as signatories;
2. cease providing any instructions to the custodian. I will do that in conjunction with McGrathNicol from now on;
3. cease dealing with all controller matters including ASIC compliance. McGrathNicol or I will deal with that;
4. make the FMIF investor database available to me for the purposes of communicating with the investors. I will continue to maintain and update that database;
5. cease any asset realisation work and provide a copy of the file maintained by you in relation to each asset and forecast cash flows that has been requested on several occasions.

G:\Current\Administrations\Client Folders\LM First Mortgage\02. Appointment\Ltr to FTI re appointment 260813.docx



As I said, I will in substance and effect be winding up the Fund and therefore I expect any ongoing role that you have will be very minimal. The only role I expect you will have with the Fund is maintenance of the AFSL which stays suspended during the course of the winding up.


I do not require you to undertake any of the functions set out in clause 18.4 of the Constitution of the Fund, nor do I think you are able to in any event given the terms of the Court Order.

Further, I will undertake all legal recoveries and generally all duties relating to the realisation and winding up of the Fund (subject to the terms of McGrathNicol's appointment).

If you disagree with any of this would you please let me know immediately as I would then propose to seek further directions from the Court should there be any misunderstanding.

I also understand that you (via your solicitors) contend that you must maintain the Register of Members, call members' meetings if requested to do so, prepare financial reports and comply with audit requirements as well as comply with the continuous disclosure regime under the Corporations Act. I will write to you separately about that shortly.

Yours faithfully



David Whyte
Receiver

CC: Joseph Hayes, McGrathNicol



Tel: +61 7 3237 5999
Fax: +61 7 3221 9227
www.bdo.com.au

Level 10, 12 Creek St
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
Australia

Ginette Muller
FTI Consulting
22 Market Street
Brisbane QLD 4000

28 August 2013

Dear Ginette

RE: LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288

I am writing to you because I have been provided with a copy of Submissions made by your Counsel to the Court. I attach a copy and in particular paragraph 12 concerns me in that it is contended that you continue to need to comply with various statutory provisions. I address my concerns, and my views below.

Register of Members

It is suggested that LM Investment Management Limited (In Liquidation) ("LMIM") must maintain a register of members under section 167A(2) of the Act.

Clearly, a register of the members of the Fund must be maintained as required by that provision and by clause 22 of the Constitution during the winding up of the Fund. However, I do not think it is correct to say that the maintenance of that Register is something that must be performed by LMIM itself.

Pursuant to the Order made on 21 August 2013, I have been appointed to take responsibility for ensuring that the Fund is wound up in accordance with its Constitution. Where (as in the case of the Fund) a managed investment scheme is a Trust, it has been said (in *Re: Stacks Managed Investments Limited*) [2005] NSWSC 753 that, "...what is envisaged by the winding up of a scheme is the realisation of its property, the payment by the responsible entity of liabilities incurred on behalf of the scheme or the retention by it of funds with which to meet its liabilities, the ascertainment of the members' entitlements, and the distribution of the trust assets to the members in accordance with their entitlements."

The ascertainment of members' entitlements, and the distribution of Trust assets to members, necessarily involves access to and maintenance of a register of those members. In order to ensure that the Fund is wound up "in accordance with its constitution" (which contains provision for the maintenance of the register of members at cl. 22), I consider that I need to ensure that the register of members of the Fund is properly maintained. I also note that, pursuant to section 174 of the Corporations Act, a person (other than the responsible entity itself) may maintain a register on behalf of a registered scheme - the register clearly need not be maintained by the responsible entity itself.

Document1



I intend to maintain the Register of Members of the Fund and to communicate with them. That seems to me to be an incidental function of winding up the Fund.

Please confirm that you agree.

Section 252B(1) Meetings

The Fund is being wound up. There is nothing for members of the Fund to deliberate upon at a meeting of members that would not concern the winding up of the Fund.

As I have said above, I intend to maintain the register of members of the Fund and to communicate with the members. In the event that any meeting is required, I will attend to it, as part of my responsibilities pursuant to the Court Order.

Please confirm that you agree.

Section 285 - Preparation of Financial Reports and Audit Requirements

I will be keeping accounts that disclose, and accurately record, the transactions and financial position and performance of the Fund. I see no purpose in you doing so as that will be an unnecessary duplication and in any event I am charged with the winding up of the Fund.

Although section 292(1)(d) of the *Corporations Act* requires that a financial report must be prepared for each financial year by the Fund, in the winding up of the Fund it is not a role that would appropriately remain with LMIM rather than with me. As the person charged with responsibility for ensuring that the Fund is wound up appropriately, the relevant information from which any financial reports must be prepared, will be in my possession. This will, very shortly, include the relevant information with respect to the financial year ended 30 June 2013.

Accounting to the members of the Fund is clearly a function for which I am responsible as the person charged with the responsibility for the winding up. Accordingly, the preparation of any necessary financial report is a function that it is appropriately undertaken by me.

In relation to an audit, my view is that an audit will be done upon the completion of the winding up. My view is that an audit is not required to be done, and it seems to me it would be an unnecessary waste of investor funds, particularly given the last audit cost in excess of \$500,000.

The audit requirement arises from section 301(1) of the *Corporations Act*. That requirement was expressly considered in the context of a managed investment scheme, in *Re Environinvest Limited (No. 4)* [2010] 81 ACSR 145, in which the Court said the following:-

"Section 301(1) of the Act requires a registered scheme to have a financial report for a financial year audited in accordance with Division 3, and to obtain an auditor's report. I doubt that these requirements have application to a managed investment scheme in the course of being wound up. ... Each scheme constitution requires the preparation of accounts and the appointment of an auditor following a winding up. These measures, it seems to me, are not intended to overlap with or augment the requirements of section 301(1). They are intended to apply in substitution for the statutory obligation when it no longer has any application."



That approach is consistent with the position taken with respect to companies that are being wound up. As you know, a company that has a liquidator appointed does not have to comply with Part 2M.3 of the *Corporations Act*.

Clause 16.10 of the Constitution provides that the RE shall arrange for an audit to audit the final accounts of the scheme after the scheme is wound up. The effect of that, in my view, is that no annual audit is required for the Fund if it is being wound up. I draw comfort from the decision in *Environinvest Limited* (No. 4).

Accordingly, I do not think an audit is necessary, but if you disagree let me know and I will approach the Court for directions to that effect.

Section 675 - Continuous Disclosure

It is suggested in the Submissions made by your Counsel that LMIM is required to ensure continuous disclosure to ASIC pursuant to section 675 of the *Corporations Act*. It appears to be suggested that there will be a requirement to lodge a document with ASIC disclosing (for example) taking any step in enforcement of a security in recovery proceedings on behalf of the Fund, and any number of other steps that are likely to be taken in the course of the winding up of the Fund.

I do not think that this is correct.

Section 675(2) relevantly requires a disclosing entity to disclose information to ASIC if it is information *"that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED Securities of the entity"*.

Section 677 of the *Corporations Act* provides:-

"For the purposes of sections 674 and 675, a reasonable person would be taken to expect information to have a material effect on the price or value of ED Securities of a disclosing entity if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether to acquire or dispose of the ED Securities."

The Fund is being wound up. No further applications for units in the Fund may be accepted (see clause 16.5 of the Fund Constitution). There will be no redemptions. The Fund has, for all intents and purposes, vested and is now simply being wound up.

Accordingly, I do not think that the continuous disclosure obligations will require LMIM as the responsible entity to disclose any information to ASIC. Even if such an obligation did continue to exist, the relevant information is information in my possession. Accordingly, insofar as there is a continuing disclosure obligation, the obligation rests with me.

Please confirm that you agree.



Conclusion

If you disagree with any of the views expressed by me above in this letter, please let me know shortly and explain the basis for your disagreement. If necessary, I will then approach the Court for directions as required.

I look forward to hearing from you shortly.

Yours faithfully

A handwritten signature in black ink, appearing to read 'David Whyte', written over a horizontal line.

David Whyte
Receiver and Manager.

Sean Russell

From: Sean Russell
Sent: Monday, 19 January 2015 5:29 PM
To: David Schwarz; 'jhayes@mcgrathnicol.com'; 'aconnelly@mcgrathnicol.com'
Cc: Ashley Tiplady
Subject: LM Investment Management Ltd (in liq) - FMIF ~20130737~
Attachments: SCPR_20130737_064; SCPR_20130737_063; SCPR_20130737_062

Dear Colleagues

Please refer to the attached correspondence on behalf of Mr Tiplady.

Yours faithfully

RUSSELLS

Sean Russell

Lawyer

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RUSSELLS

19 January, 2015

Our Ref: Mr Tiplady/Mr Sean Russell

| |
|--------------------|
| EMAIL TRANSMISSION |
|--------------------|

Mr David Schwarz
Tucker and Cowen
BRISBANE

email: DSchwarz@tuckercowen.com.au

Messrs Hayes and Connelly
McGrath Nichol
BRISBANE

email: JHayes@McGrathNichol.com.au
email: AConnelly@mcgrathnicol.com

Dear Colleagues

LM Investment Management Ltd (in liq) (receivers and managers appointed) ("LMIM")
LM First Mortgage Income Fund ("FMIF")

As you know, we act for Mr Park and Ms Muller, the liquidators of LMIM. We refer to our letter of 19 September, 2014 and to Tucker and Cowen's letter of 20 November, 2014 concerning the roles of our clients *vis-à-vis* Mr Whyte and Messrs Hayes and Connelly.

The difference of opinion as to the proper role for each party is, in our clients' view, inhibiting the efficient conduct of the winding up of the FMIF. Our clients are anxious for clarity in this respect and to ensure that they are properly discharging their duties as liquidators of the responsible entity.

Accordingly, they have instructed us to apply to the Court pursuant to section 479(3) of the *Corporations Act 2001* (C'th) for directions as to how they should proceed. We have discussed this situation with Tucker and Cowen whom we note to be in agreement that clarification by the Court is required.

In our view, this proceeding (and any future applications or cross-applications regarding LMIM) should be actively managed by the Court. There have already been a number of applications before different judges in the trial division of the Supreme Court of Queensland which has led to the inefficient practice of providing (unfortunately necessary) background information each time a matter is before the Court.

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SCPR_20130737_064.docx

It seems likely to us that there will be further court appearances and litigation as the winding up of LMIM and the various funds continue.

Accordingly, given the complex commercial background to LMIM's affairs, in our view, the various matters concerning LMIM are best dealt with on the Commercial List. This will ensure the most efficient and cost effective resolution of matters concerning LMIM which are brought before the Court.

Please find enclosed a draft application to be made by our clients concerning the roles to be undertaken by the various parties in the winding up of the FMIF and a draft commercial listing statement. Would you please let us know your attitude to our clients' proposed course of action.

Would you please let us know that position by 3.00pm (AEST) on Wednesday, 21 January, 2015.

Yours faithfully



Ashley Tiplady
Partner

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ATiplady@RussellsLaw.com.au

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**

Applicants: JOHN PARK AND GINETTE 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

COMMERCIAL LIST STATEMENT

The Plaintiff makes the following statement in support of an application to have the
above proceeding listed on the Commercial List:-

1. The nature of the dispute is the uncertainty of the applicants' proper rights,
powers, duties and obligations arising out of their position as liquidators of LM
Investment Management Limited (in liquidation)(receivers and managers
appointed)("LMIM") in circumstances where:-

- (a) LMIM remains the responsible entity of the LM First Mortgage Income
Fund ARSN 089 343 288 ("FMIF");
- (b) Mr David Whyte has been appointed by the Court as a receiver, pursuant
to section 601NF(1) of the *Corporations Act 2001* (C'th), in order to ensure
that the FMIF is wound up in accordance with its constitution; and
- (c) Messrs Joseph Hayes and Anthony Connelly have been appointed as
receivers and managers by a secured creditor of the FMIF.

2. The issues which arise in the proceedings are:-

- (a) the proper interpretation of:-
 - (i) section 601NF(1) of the *Corporations Act 2001* (C'th); and

COMMERCIAL LIST STATEMENT

Filed on behalf of the Plaintiff

Russells
Level 18
300 Queen Street
BRISBANE 4000
Phone: 07 3004 8888
Fax: 07 3004 8899

SCPR_20130737_063.docx

-
- (ii) the orders of Dalton J made on 21 August, 2013 in *Bruce and Anor v LM Investment Management Limited (in liquidation)* (2013) 94 ACSR 684.

3. The proceeding ought be included on the Commercial List for the following reasons:-

- (a) the estimated trial time is fewer than five days;
- (b) the matter is a complex one, which would benefit from active case management;
- (c) the issues in dispute are generally of a commercial character, in that:-
- (i) LMIM is a company, which was (and remains) the responsible entity of a number of registered managed investment schemes;
- (ii) resolution of the application will require guidance as to the proper interpretation of section 601NF and, more broadly, Chapters 5.6 and 5C of the *Corporations Act 2001* (C'th); and
- (iii) the application seeks to clarify the rights, powers, duties and obligations of secured creditors, receivers and managers, court appointed receivers, liquidators and responsible entities *inter se* in a complex commercial setting.

4. The attitude of the other parties to this litigation as to the listing of this proceeding on the Commercial List is as follows:-

- (a) **TO BE ASCERTAINED**

5. The contentions of the Plaintiff in relation to the proceeding are that:-

- (a) the applicants' rights, powers, duties and obligations are as set out in the applicants' solicitors' letter to Tucker and Cowen dated 19 September, 2014, which is annexed to the affidavit of Mr Tiplady at page X of exhibit AJT-1; and

(b) the Court should provide directions to the Applicants pursuant to section 479(3) of the *Corporations Act 2001* to that effect.

6. The special directions required in this proceeding, and the reasons why, are:-

(a) #07.

7. There are no circumstances of urgency in relation to the proceeding.

Signed: _____

Description: Solicitors for the Applicants

Dated: day of

2015

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**

Applicants: **JOHN PARK AND GINETTE 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

First 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**

AND

Second Respondents: **JOSEPH HAYES AND ANTHONY CONNELLY IN THEIR
CAPACITIES AS RECEIVERS AND MANAGERS OF THE
PROPERTY OF THE LM FIRST MORTGAGE INCOME FUND
ARSN 089 343 288**

A. DETAILS OF APPLICATION

This Application is made under Section 479(3) of the *Corporations Act* 2001.

On the facts stated in the supporting Affidavit(s), the Applicants seek:-

1. Directions regarding the Applicants' powers, functions, role and obligations in respect of the LM First Mortgage Income Fund ARS 089 343 288 ("FMIF");
2. In the interim, directions regarding the proper course of this application;

ORIGINATING APPLICATION

Filed on behalf of the Applicants

Form 2 (v.2) Rule 2.2

Russells
Solicitors
Level 18
300 Queen Street
BRISBANE
Phone: 07 3004 8888
Fax: 07 3004 8899

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3. An order that the Applicants' costs of the application be paid from the assets of the FMIF;

4. Such further or other Order as the Court deems appropriate.

Date: January, 2015

Signed: Russells

Description: Solicitors for the Applicants

B. NOTICE TO RESPONDENTS

TO: Mr David Whyte as the person responsible for ensuring the FMIF is wound up in accordance with its constitution.

of BDO, Level 10, 12 Creek Street, Brisbane, Queensland

TO: Messrs Joseph Hayes and Anthony Connelly as receivers and managers of the FMIF

of McGrath Nichol, Level 1, 175 Eagle Street, Brisbane, Queensland

This Application will be heard by the Court at the Law Courts Complex, George Street, Brisbane at a date to be fixed.

If you wish to oppose this Application or to argue that any different Order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the Orders sought may be made without further notice to you. In addition you must before the day for hearing file a Notice of Appearance in this Registry. The Notice should be in Form 4. You must serve a copy of it at the Applicant's address for service shown in this Application as soon as possible.

NOTE: Unless the Court otherwise orders, a Respondent that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

Date of filing:

Registrar

This Originating Application is filed by Russells, Solicitors for the Applicant.

D. SERVICE

The Applicant's address for service is Level 18, 300 Queen Street, Brisbane, Queensland, 4000, telephone 07 3004 8888, facsimile 07 3004 8899, email Mail@RussellsLaw.com.au.

It is intended to serve a copy of this Original Application on each Respondent and on any person listed below:-

Mr David Whyte as the person responsible for ensuring the FMIF is wound up in accordance with its constitution of BDO, Level 10, 12 Creek Street, Brisbane, Queensland

Messrs Joseph Hayes and Anthony Connelly as receivers and managers of the FMIF of McGrath Nichol, Level 1, 175 Eagle Street, Brisbane, Queensland

Sean Russell

From: Stephen Russell
Sent: Wednesday, 21 January 2015 8:32 PM
To: dschwarz@tuckercowen.com.au
Cc: Ashley Tiplady; Sean Russell
Subject: LMIM - Mr Whyte ~20130471~
Attachments: SCR_20130471_415(3).pdf; 1372_001.pdf

Dear colleagues

Please find attached our letter, and also the proceedings referred to therein. Please note that we have asked for your reply within seven days.

Yours faithfully

RUSSELLS

Stephen Russell
Managing Partner

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

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RUSSELLS

21 January, 2015

Our Ref: Mr Russell
Your Ref: Mr Schwarz

EMAIL TRANSMISSION

Tucker & Cowen
Solicitors
BRISBANE

email: dschwarz@tuckercowen.com.au

Dear Colleagues

**LM Investment Management Limited (In Liquidation) (Receivers and Managers Appointed) ("LMIM") – Role of LMIM in the winding up of the LM First Mortgage Income Fund ("FMIF")
Role of Mr Whyte under the order of Dalton J made on 26 August, 2013.**

We refer to our letter dated 19 September, 2014, and to your letter in reply dated 20 November, 2014.

You have foreshadowed a further detailed reply. We have received no further correspondence from you.

In our letter of 19 September, we explained the bases of our clients' contentions as to the role of the company, LMIM.

It is appropriate that we mention, for the sake of completeness, that our clients also take the view that they are, as liquidators, charged with the following functions and duties, as set out in the following provisions of the *Corporations Act 2001* ("the Act").

Dalton J made the order of 26 August, 2013 after full argument and in the knowledge that the company had become insolvent, that our clients had become its liquidators, that LMIM would remain the responsible entity of the FMIF, and that LMIM was to wind up the FMIF, subject to the particular tasks assigned to Mr Whyte, with the powers conferred on him for that purpose.

There are five particular matters that arise.

1. As you will, we hope, accept, the liquidators may, subject to the provisions of section 556 of the Act, pay any class of creditors in full (including creditors for whose debts LMIM has a right of

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indemnity out of the Scheme Property of the FMIF), pursuant to section 477(1)(b) of the Act.

This function meshes with the proof of debt regime (see paragraph 2 below) and it is only the liquidators who may do this.

2. The liquidators must call for and adjudicate on proofs of debt and claims against LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to Division 6 of Part 5.6 of the Act and to compromise such debts or claims under subsections 477(1)(c) and (d) of the Act. The FMIF is not a legal entity, and creditors must of course make their claims (for debts and other claims) against the company.

Given that LMIM is in liquidation, this must be done by the proof of debt process, save for the (hopefully rare) case in which leave is granted under section 500 of the Act for a third party to bring proceedings against LMIM.

Again, it is only the liquidators who may deal with proofs of debt; and they are obliged by the Act to do so.

3. We refer next to the matter of LMIM's insurance. In our clients' view, they must pay to third parties, in respect of whose claims monies are received under a contract of insurance, the sum necessary to discharge the liability to the third party, after deducting any expenses, pursuant to section 562 of the Act.

Again, this is a statutory function which the liquidators must discharge.

This issue is topical because your client has issued proceedings (no 12317 of 2014 in the Supreme Court of Queensland) in the name of LMIM as responsible entity of the FMIF, against LMIM, surprisingly without seeking leave under section 500 of the Act.

4. We have also informed you that, in our clients' view, they may recover property of the FMIF pursuant to the provisions of Part 5.7B Division 2 of the Act. The provisions of Part 5.7B Division 2 of the Act are plainly available to the liquidators of LMIM to recover property of the Fund: the definition of "property" in section 9 of the Act extends to legally as well as beneficially owned property. (The provisions of Part 5.7B, Division 6 are confined to insolvent trading receipts (Divisions 3 and 4)).

Again, this is topical. The proceedings that Mr Whyte has instituted (BS12317 of 2014) are founded on allegations of breach by the directors of LMIM of their duties under sections 180, 181 and 182 of the Act. It is alleged, in short, that the Deed Poll of 21 June, 2011, for the division of the settlement proceeds, was a bad deal, and that the payment of \$15.5 million ("the Settlement Payment") was also bad.

Assuming those allegations to be true, it follows that the liquidators could and should challenge the Deed Poll and the Settlement Payment as Uncommercial Transactions and as an Unreasonable Director-Related Transaction under sections 588FB, 588FDA, 588FE and 588FF of the Act.

Recovering Uncommercial Transactions and Unreasonable Director-Related Transactions is easier than proof of the breaches that have been alleged; causation is not a necessary element; and the range of relief is substantially wider than that which is sought in these proceedings.

It is trite that only liquidators may institute such proceedings. It follows that our clients may – and should - investigate whether any such proceedings are available. Your client should, in our clients' view, cooperate with them in such investigations and in any such proceedings (possibly including the new proceedings we have mentioned).

5. Finally, and consistently with the proof of debt regime that applies to the winding-up of LMIM and the FMIF, it is the liquidators who are charged with the duty of paying the debts of LMIM (including those in respect of which LMIM has a right of indemnity out of the Scheme Property of the FMIF), pursuant to section 506(3) of the Act.

In our clients' view, the Act charges them, and only them, with this duty.

We record that Mr Whyte made no attempt to discuss the newly instituted proceedings with the liquidators before instituting them, and he seems to have given no consideration to the use of the provisions of Division 2 of Part 5.7B. He seems, consistently with the oppositional attitude exhibited in your letter of 20 November, 2014, to have firmly set his face against any cooperation with the liquidators, whom he quite wrongly regards as completely shorn of any role in the winding-up of the FMIF.

In the case of these new proceedings, there is a risk that the proceedings may fail, or may yield less than they should yield, because the provisions of Division 2 of Part 5.7B have not been invoked. Further, it may be that an insurance policy would respond to claims under Part 5.7B Division 2 of the Act, but not to the claims for compensation or damages for breach of duty that have been advanced.

There is a consequent risk that the interests of creditors and members will be prejudiced as a result of Mr Whyte's erroneous and uncooperative attitude.

We ask that you take Mr Whyte's instructions and let us know whether he differs with the propositions set out above and, if so, please provide reasons. Given the long delay since our letter dated 19 September, 2014, the opposition exhibited in your general reply dated 20 November, 2014, your failure to provide the foreshadowed detailed reply, and the importance of the work that the liquidators must do, we have been instructed to seek your reply within seven days.

Yours faithfully



Stephen Russell
Managing Partner

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

Our Reference Jacqueline Ogden 201401822
Direct Line 3231 1688
Email jacqueline.ogden@gadens.com
Partner Responsible Scott Couper

gadens

ABN 30 326 150 968

ONE ONE ONE
111 Eagle Street
Brisbane QLD 4000
Australia

23 December 2014

LM Investment Management Limited (Receivers and Managers Appointed)
(In Liquidation) ACN 077 208 461
c/- FTI Consulting
Corporate Centre One
Level 9, 2 Corporate Court
BUNDALL QLD 4217

GPO Box 129
Brisbane QLD 4001

T +61 7 3231 1666
F +61 7 3229 5850

gadens.com

Attention: John Richard Park and Ginette Dawn Muller

By service

Dear Sir and Madam

**LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 as Responsible Entity of the LM First Mortgage Income Fund ARSN 089 343 288 -v- LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 & Ors
Supreme Court of Queensland Proceeding No. 12317/14 ("Proceedings")**

We confirm we act on behalf of the plaintiff in the above Proceedings.

Please find **enclosed** by way of service claim and statement of claim numbered 12317 of 2014 filed in the Brisbane registry of the Supreme Court of Queensland on 19 December 2014.

Yours faithfully



Jacqueline Ogden
Associate

Enc

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317/14

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

AND

First Defendant : **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

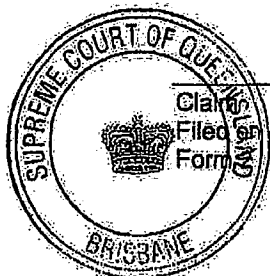
AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

CLAIM

The plaintiff claims:

1. As against each of the first, second, third, fourth, fifth, sixth and seventh defendants:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that each defendant pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;



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GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SCZ:JSO:201401822

- (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
2. As against the seventh and eighth defendants a declaration that:
- (a) The seventh defendant is entitled to be indemnified out of the assets of the LM Managed Performance Fund in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (b) The seventh defendant has a lien or charge over the assets and undertakings of the LM Managed Performance Fund in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (c) The plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the LM Managed Performance Fund.
3. Such further or other orders as this Court deems fit.

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 19 December 2014:

Registrar:



To the defendants:

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.

If you object that these proceedings have not been commenced in the correct district of the Court, that objection must be included in your Notice of Intention to Defend.

PARTICULARS OF THE PLAINTIFF:

Name: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & 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/- David Whyte, BDO
Level 10
12 Creek Street
BRISBANE QLD 4000

**Plaintiff's solicitors name:
and firm name:**

**Scott Couper
Gadens Lawyers**

Solicitor's business address:

**Level 11
111 Eagle Street
BRISBANE QLD 4000**

Address for service:

**Level 11
111 Eagle Street
BRISBANE QLD 4000**

**Telephone: 07 3231 1666
Fax: 07 3229 5850**

Signed:

Gadens

Description:

Solicitor for the plaintiff

Dated:

19 December 2014

Claim is to be served on:

**The First Defendant, Second Defendant, Third Defendant,
Fourth Defendant, Fifth Defendnat, Sixth Defendant, Seventh
Defendant and Eighth Defendants**

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER:

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

STATEMENT OF CLAIM

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

Parties and roles

1. The seventh defendant, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM):

Statement of claim
Filed on behalf of the Plaintiff
Form 16 Rules 22, 146

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- (a) is and was at all material times a company duly incorporated and capable of suing in its own name;
 - (b) is and was at all material times the Responsible Entity (RE) of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF);
 - (c) was, until order of this Honourable Court on 12 April 2013 (LM Order), trustee of the trust named The LM Managed Performance Fund (MPF);
 - (d) was placed into voluntary administration on 19 March 2013 and John Park and Ginette Muller of FTI Consulting were appointed voluntary administrators;
 - (e) had receivers and managers, Joseph Hayes and Anthony Connelly of McGrathNicol, appointed to certain of its property held in its capacity as RE of FMIF on 11 July 2013 by Deutsche Bank AG (Deutsche);
 - (f) was placed into liquidation on 1 August 2013 following a resolution of its creditors that it be placed into liquidation and that John Park and Ginette Muller be appointed liquidators (Liquidators).
2. At all material times each of the first to sixth defendants was a director of LMIM.
3. By Order of this Honourable Court dated 21 August 2013 (FMIF Order), David Whyte (Receiver), Partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd:
- (a) was appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (Appointment);
 - (b) was appointed as receiver of the property of the FMIF;
 - (c) has, in relation to the property of FMIF for which he is appointed receiver, the powers set out in s 420 of the *Corporations Act 2001* (Cth) (Act); and
 - (d) without derogating in any way from the Appointment or the Receiver's powers pursuant to the FMIF Order, was authorised to, inter alia:
 - (i) take all steps necessary to ensure the realisation of property of FMIF held by LMIM as RE of the FMIF by exercising any legal right of LMIM as RE of the FMIF in relation to the property including but not limited to:
 - (A) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate or finalise the sale of the property;
 - (B) providing a response as appropriate to matters raised by receivers of property of LMIM as RE of the FMIF to which receivers have been appointed;
 - (C) 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 the property;
 - (D) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (E) executing contracts, transfers or releases or any such other documents as are required to carry out any of the above;
 - (ii) 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, including the execution of 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;

(e) is entitled to bring and does bring these proceedings in the name of LMIM as RE of the FMIF.

4. Further, by the LM Order, LMIM was removed as trustee of the MPF and the Eighth Defendants, Korda Mentha Pty Ltd ACN 100 169 391 and Calibre Capital Pty Ltd ABN 66 108 318 985, were appointed joint and several trustees of the MPF.

Bellpac loans

5. On or about 10 March 2003, Permanent Trustee Australia Limited as custodian of LMIM as RE of the FMIF (**PTAL**) entered into a loan agreement with Bellpac (**FMIF Bellpac Loan Agreement**).
6. Pursuant to the FMIF Bellpac Loan Agreement, PTAL agreed to advance and did advance the sum of \$16M to Bellpac (**FMIF Bellpac Loan**).
7. As security for the FMIF Bellpac Loan, Bellpac granted to:
- (a) a first registered mortgage (**PTAL Mortgage**) over land known as "Balgownie No 1 Colliery Wollongong" in the state of New South Wales (**Property**); and
- (b) a registered charge over Bellpac (**PTAL Charge**).
8. Between December 2003 and July 2008, the FMIF Bellpac Loan Agreement was varied.
9. On or about 23 June 2006 LMIM as trustee for the MPF entered into a loan agreement with Bellpac (**MPF Bellpac Loan Agreement**).
10. Pursuant to the MPF Bellpac Loan Agreement, LMIM as trustee for the MPF agreed to advance and did advance the sum of \$6M to Bellpac (**MPF Bellpac Loan**).
11. As security for the MPF Bellpac Loan, Bellpac granted to LMIM as trustee for the MPF:
- (a) a registered mortgage over the Property (which was registered as the third registered mortgage) (**MPF Mortgage**); and
- (b) a registered charge over Bellpac (**MPF Charge**).
12. On or about 23 June 2006 LMIM as RE of the FMIF, LMIM as trustee for the MPF, GPC No. 11 Pty Ltd, GPC No. 12 Pty Ltd, GPC No. 8 (Bulli) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Bellpac entered into a Deed of Priority (**Deed of Priority**) pursuant to which:
- (a) LMIM as RE for the FMIF was granted first priority to the extent of the Principal Amount of \$33.8M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
- (b) LMIM as trustee for the MPF was granted second priority to the extent of the Principal Amount of \$11M plus Interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
- (c) by clause 8, LMIM as trustee for the MPF was required to provide a release of any security held by it where an asset the subject of any security held by PTAL was sold pursuant to a bona fide sale for approximately fair market value.
13. From in or about March 2006 Bellpac was in default under the FMIF Bellpac loan and PTAL as custodian of LMIM as RE of the FMIF was entitled to exercise rights under the PTAL Mortgage and the PTAL Charge.
14. On or about 6 May 2009 PTAL appointed receivers and managers to Bellpac.

15. On or about 30 July 2009 voluntary administrators were appointed to Bellpac.
16. On or about 3 September 2009, Bellpac was placed into liquidation following a resolution of its creditors.

Bellpac sale of the Property to Gujarat

17. On or about 22 September 2004 Bellpac and GPC Equipment Pty Ltd (**GPC**) and Gujarat NRE Coking Coal Limited (formerly Gujarat NRE Minerals Limited)(**Gujarat**), Bounty Industries Australia Pty Limited (**Bounty**) and Coalfields (NSW) Pty Limited (**Coalfields**) entered into a Land and Asset Sale Agreement (**LASA**) pursuant to which Bellpac agreed to sell to Gujarat and Coalfields certain assets including, inter alia, the Property.
18. In addition to the LASA, Bellpac and GPC and Gujarat and Coalfields entered into certain other agreements on or about 3 December 2004 which, inter alia, amended the LASA (**2004 Agreements**).
19. A dispute arose between Bellpac and Gujarat as to the parties' rights, obligations and liabilities under the LASA and the 2004 Agreements (**Dispute**).
20. In 2007 and 2008 Bellpac and Gujarat executed settlement deeds (**Settlement Deeds**) in order to resolve the Dispute.
21. In 2009, a dispute arose between LMIM, PTAL and Bellpac and Gujarat and Coalfields as to the parties' rights, obligations and liabilities under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds (**2009 Dispute**).
22. Legal proceedings were commenced by:
 - (a) Gujarat against Bellpac in or about May 2009 (**Gujarat proceedings**);
 - (b) LMIM, PTAL and Bellpac against Gujarat in or about July 2009 with further defendants, including Coalfields, Bounty and GPC, joined in or about November 2009 (**Bellpac proceedings**);
 - (c) by Coalfields against Bellpac and Gujarat by cross-claim in the Gujarat proceedings (**Coalfields cross-claim**),together (the **Proceedings**).

Funding of the Proceedings

23. In or about July 2009 the first to sixth defendants formed the view that LMIM as RE of the FMIF was not in a position to fund the Proceedings.
24. From in or about July 2009, as registered mortgagee of the Property with second priority under the Deed of Priority, LMIM as trustee of the MPF:
 - (a) funded the Proceedings as second mortgagee in an amount of not more than \$1,380,431.51; and
 - (b) drew down such funding against the MPF Bellpac Loan.

Mediation Heads of Agreement

25. In or about November 2010, a non-binding Heads of Agreement recording Agreement in Principle was executed in the course of a mediation between the parties to the Proceedings (**Mediation Heads of Agreement**).
26. Pursuant to the Mediation Heads of Agreement:

- (a) the Property was to be sold to Gujarat or its nominee by either the liquidator of LMIM (with mortgagees' consent) or via a mortgagee sale for an amount up to \$65.5M as follows:
 - (i) \$15.5M to be paid by:
 - (A) An instalment of \$1M within 1 month; and
 - (B) \$14.5M within 6 months;
 - (ii) Vendor finance for \$46-50M (to be updated on amortisation);
- (b) LMIM was to pay \$1.3M to Coalfields (NSW) Pty Limited ACN 111 369 110 to secure its release of certain caveats over the Property;
- (c) LMIM was to be granted an option to purchase a half share in the Property for \$15M in certain circumstances.

27. The parties continued to negotiate a settlement of the Proceedings between November 2010 and June 2011.

Settlement of the LMIM Bellpac proceedings

28. On or about 21 June 2011:

- (a) LMIM in its capacity as RE for FMIF, PTAL, Bellpac, Gujarat and Southbulli Holdings Pty Limited (**Southbulli**) executed a Deed of Release pursuant to which the parties agreed to settle all of their disputes, including the disputes in the Proceedings and to regulate their relationship (**Deed of Release**);
- (b) simultaneously with the execution of the Deed of Release, PTAL, LMIM in its capacity as RE for FMIF, Bellpac, Gujarat, Southbulli and Coalfields executed a Deed of Settlement and Release pursuant to which these parties agreed to settle their differences in respect of the Proceedings (**Deed of Settlement and Release**); and
- (c) PTAL, as mortgagee exercising power of sale under the PTAL Mortgage, entered into a contract to sell the Property to Gujarat for a purchase price of \$10M exclusive of GST (**Gujarat Contract**).

29. By clause 7 of the Deed of Release Gujarat was obliged to pay to PTAL the settlement sum of \$35.5M exclusive of GST by way of bank cheque simultaneously with the execution and delivery of that deed.

30. By clause 2 of the Deed of Settlement and Release:

- (a) PTAL was to pay to Coalfields the sum of \$1.3M by bank cheque simultaneously with the execution and delivery of that deed;
- (b) the sum of \$1.3M was to be held in trust until completion of the Gujarat Contract; and
- (c) if the Gujarat Contract was terminated the sum of \$1.3M, together with any accretions thereon, was to be refunded in full to PTAL.

Deed Poll

31. On or about 21 June 2011, a Deed Poll was executed by the first to sixth defendants as directors of LMIM.

32. The Deed Poll provided, inter alia, that:

- (a) "**Settlement Proposals means the Bellpac Settlement and the Proceeds Split**";

- (b) **"Proceeds Split means the proposal between FMIF and MPF under which it is proposed to split the proceeds that it has recovered from the litigation in the ratio of 65% of the proceeds to the FMIF and 35% of the proceeds to MPF";**
 - (c) **"Bellpac Settlement means the principal agreement that has been reached between LM and Gujarat pursuant to which LM will inter alia sell the Bellpac Land to Gujarat and settle the litigation with Gujarat for a total consideration of \$45.5 Million and the RE will pay \$1.3m to Coalfields to secure the withdrawal of certain caveats";**
 - (d) **"The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation";**
 - (e) **"after giving full and comprehensive consideration to all of the relevant issues, the directors have concluded ..." inter alia:**
 - (i) **"there is a need for the FMIF RE to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF trustee";**
 - (ii) **"LM as trustee of MPF will comply with its general law fiduciary duties as a trustee if it agrees to the Settlement Proposals pursuant to which MPF will be obliged to release its security over the Bellpac Land".**
33. **Contrary to the matters set out in the Deed Poll referred to in paragraph 32(d) above the first to sixth defendants:**
- (a) **did not in fact have an understanding that it was appropriate for MPF's contribution to the funding of the LMIM Bellpac proceedings to be recognised by providing MPF with a share of any proceeds recovered by the litigation;**
 - (b) **had an expectation that if LMIM and PTAL were successful in the Proceedings and the Property was developed by LMIM as RE for the FMIF then:**
 - (i) **the amount owed under the FMIF Bellpac loan would be repaid in full; and**
 - (ii) **the amount owed under the MPF Bellpac loan would be repaid in part and possibly in full.**
34. **Contrary to the matters set out in the Deed Poll referred to in paragraph 32(e) above:**
- (a) **in circumstances where:**
 - (i) **pursuant to the Gujarat Contract, PTAL sold the Property to Gujarat as mortgagee exercising power of sale; and**
 - (ii) **in any event the Deed of Priority contains the terms pleaded in paragraph 12 above,**

LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the Property; and
 - (b) **there was no necessity for LMIM as RE of FMIF to reach agreement with LMIM as trustee of the MPF about sharing the amounts payable to PTAL under the Deed of Release or the Gujarat Contract because:**
 - (i) **LMIM as trustee of the MPF was not a party to the Deed of Release nor the Gujarat Contract;**

- (ii) the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract.

Payment to MPF of monies payable to FMIF by Gujarat under Gujarat Contract and Deed of Release

- 35. LMIM as trustee of the MPF received the sum of \$15,546,147.85 (**Settlement payment**) from the proceeds payable to PTAL as custodian of LMIM as RE of the FMIF pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.
- 36. LMIM directed that the Settlement payment be made to LMIM as trustee of the MPF from the amounts payable to LMIM as RE of the FMIF and PTAL pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.
- 37. LMIM as trustee of the MPF had no entitlement to payment of the Settlement payment:
 - (a) in circumstances where:
 - (i) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage; and
 - (ii) PTAL was, as at 22 June 2011, owed the sum of \$52,480,469.12 by Bellpac comprising the Principal Amount, Interest, Other Moneys and Enforcement Expenses (as those terms are defined in the Deed of Priority); and
 - (b) by reason of the matters pleaded in paragraphs 33 and 34 above.

Contraventions of s 180, 181 and 182 of the Corporations Act

- 38. At all material times in their capacity as directors of LMIM, the first to sixth defendants owed duties to LMIM under:
 - (a) section 180(1) of the Act and at general law to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in LMIM's circumstances, and occupied the office held by, and had the same responsibilities within LMIM as the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 181(1) of the Act and at general law to exercise their powers and discharge their duties in good faith and in the best interests of LMIM and for a proper purpose;
 - (c) section 182(1) of the Act and at general law not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to LMIM.
- 39. In the premises pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above the first to sixth defendants:
 - (a) failed to exercise their powers and discharge their duties with a reasonable degree of care and diligence;
 - (b) did not act in good faith and in the best interests of LMIM, or for a proper purpose;
 - (c) improperly used their position as directors of LMIM to gain an advantage for the MPF;

(d) in the premises, acted in breach of the duties pleaded in paragraph 38 above.

40. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment.

LMIM's involvement in contraventions by directors

41. LMIM knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

42. By reason of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13, 17-37 and 41 above LMIM was involved in the contraventions of the duties pleaded in paragraph 39 above.
43. In the premises LMIM is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment.

Contravention of s 601FD of the Corporations Act

44. At all material times in their capacity as officers of LMIM as RE of the FMIF, the first to sixth defendants owed duties under:
- (a) section 601FD(1)(b) of the Act to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 601FD(1)(c) of the Act to act in the best interests of members of the FMIF and, if there is a conflict between the members' interests and the interests of the RE, give priority to the members' interests;
 - (c) section 601FD(1)(e) not to make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the member of the FMIF.
45. In the premises pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above the first to sixth defendants:
- (a) failed to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) did not act in the best interests of the members of the FMIF and give priority to the interests of the members of the FMIF;
 - (c) improperly used their position as officers of the RE of FMIF to gain an advantage for the MPF;
 - (d) in the premises, acted in breach of the duties pleaded in paragraph 44 above.
46. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment.

LMIM's involvement in contraventions by officers

47. LMIM knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

48. By reason of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 and 47 above LMIM was involved in the contraventions of the duties pleaded in paragraph 45 above.
49. In the premises, LMIM is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment.

Rights of LMIM as former trustee of the MPF and the Plaintiff's right of subrogation

50. As former trustee of the MPF LMIM has a right of indemnity out of the assets of the MPF with respect to any liability of LMIM in these proceedings.
51. Any right of indemnity of LMIM as former trustee of the MPF operates as an equitable lien over the assets of the MPF.
52. The eighth defendants hold the assets of the MPF subject to any right of indemnity and lien of LMIM over those assets.
53. LMIM is insolvent.
54. By reason of the matters pleaded in paragraphs 50 to 53 above, the plaintiff is entitled to be subrogated to LMIM's right of indemnity and lien to the extent of LMIM's liability in these proceedings.

The Plaintiff claims the following relief:

1. As against the first defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the first defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
2. As against the second defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the second defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
3. As against the third defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the third defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.

4. As against the fourth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fourth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
5. As against the fifth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fifth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
6. As against the sixth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the sixth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
7. As against the seventh defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the seventh defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
8. As against the seventh and eighth defendants a declaration that:
 - (a) The seventh defendant is entitled to be indemnified out of the assets of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (b) The seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (c) The plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the MPF.

This pleading was settled by Ms Madelaine Luchich of Junior Counsel.

Signed: 
Description: Solicitors for the Plaintiff
Dated: 19 December 2014

NOTICE AS TO DEFENCE

Your Defence must be attached to your Notice of Intention to Defend.

Sean Russell

From: Alison Woodbury [awoodbury@tuckercowen.com.au]
Sent: Wednesday, 28 January 2015 1:34 PM
To: Ashley Tiplady; Sean Russell
Cc: PBowden@claytonutz.com; David Schwarz; Geoff Hancock
Subject: LM Investment Management Limited (in liquidation) (Receivers & Managers appointed); LM First Mortgage Income Fund (Receivers & Managers appointed) (Receiver appointed)
Attachments: letter to Russells Lawyers (TCS00927328).pdf

Please see attached, forwarded on behalf of David Schwarz.

Regards

Alison Woodbury
Personal Assistant

E: awoodbury@tuckercowen.com.au

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Dugald Hamilton.
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Our reference: Mr Schwarz/Mr Hancock

28 January 2015

Your reference: Mr Tiplady / Mr Sean Russell

Mr Ashley Tiplady
Russells Lawyers
Brisbane

Email: atiplady@russellslaw.com.au
seanrussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (in liquidation) (Receivers & Managers appointed) ("LMIM")
LM First Mortgage Income Fund (Receivers & Managers appointed) (Receiver appointed) ("LMIF")

We refer to your letter of 19 January 2015, attaching a draft Application and Commercial List Statement with respect to a proposed application for directions in relation to the winding up of the FMIF.

As you know, there has been an exchange of correspondence between our respective clients, and between our respective firms, in relation to the role of our client and, to an extent, the role of your client in the winding up of the FMIF. Our client's understanding of the Court's Order was set out and explained in correspondence early in our client's appointment; particularly, our client's letters of 26 and 28 August 2013, to which your clients (LMIM and its liquidators) did not respond to identify areas of disagreement for over a year. Your client's position has been outlined in correspondence from your Mr Russell dated 19 September 2014 (attached to an email of 25 September 2014), to which we responded on 20 November 2014. As you know, following that letter, there were without prejudice discussions between our respective clients.

We will respond separately to the correspondence dated 21 January 2015 received from your Mr Stephen Russell.

Returning to your letter of 19 January, it is our client's view that the Orders of Justice Dalton dated 21 August 2013 are reasonably clear, and that it is plain both from the Order and also from Her Honour's Reasons for Judgment that LMIM is to have a very limited role (if any role at all) in the winding up of the FMIF. That said, your client has plainly taken a different view, and that being the case it is appropriate that the Court give direction if there are any particular areas of disagreement identified that are likely to affect the conduct of the winding up of the FMIF.

As to the proposed Application itself:-

1. First, the Application is expressed to be brought by the liquidators of LMIM under section 479(3) of the *Corporations Act 2001*. That provision is directed to an application by a liquidator for directions in relation to the winding up of a company, not of a managed investment scheme. It is, of course, LMIM (not its liquidators) who is the responsible entity of the FMIF.

In our view, if your clients wish to seek directions from the Court in relation to the winding up of the FMIF, that Application should be made by LMIM under section 601NF of the *Corporations Act*, rather than by the liquidators of LMIM under section 479(3). We anticipate that your client is alive to that issue, given that section 601NF(1) is mentioned in the draft Commercial List Statement.

2. The issues that your client seeks to agitate concern, in substance, the ambit of Orders made by Justice Dalton on 21 August 2013 (again, as recognised in paragraph 2(a)(ii) of the draft Commercial List Statement). That being the case, the proper course would, in our view, be to make any application for advice or direction concerning those orders, in the proceeding in which the order was made. The parties in that matter would be interested parties who would need to be served, as addressed below.
3. The proposed Application names as respondents only our client (Mr Whyte) and Messrs Hayes and Connelly, the receivers and managers appointed by Deutsche Bank AG (Sydney branch) to the property of the FMIF. The proposed Application does not name as respondents certain persons who ought properly be served and given an opportunity to respond, including at the least:-
 - (a) ASIC; and
 - (b) Deutsche Bank itself (who still hold an undischarged security over the entirety of the assets of the FMIF).

Further, each of the parties to the proceeding in which the Order was made, ought to be given notice of the Application and an opportunity to be heard on it, since the Order of Justice Dalton was the result of extensive argument as between the parties to that proceeding. We fail to see how any direction as to the proper construction of that Order, and certainly any orders which might vary the operation of that Order, could be made in their absence.

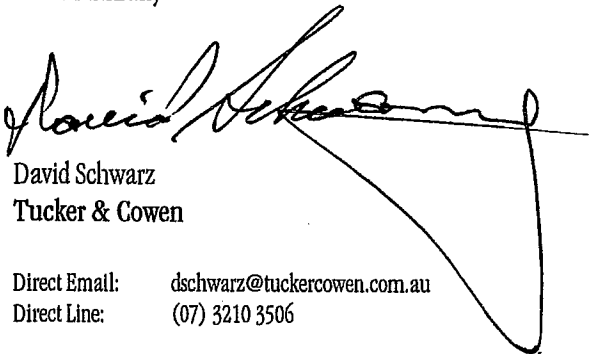
4. The Application does not identify any particular issue about which direction is sought – the ambit of the Application is in the broadest and most general of terms. An application in such broad terms runs the very real risk, we think, either of being dismissed summarily as raising no real issue of controversy for direction or determination, or (if it proceeds) of descending into an unnecessarily lengthy consideration of a broad range of questions of only tangential and hypothetical relevance to the actual winding up of the FMIF. More importantly it would not provide specific clarification as to the appropriate party to be carrying out specific tasks in the context of a winding up. As such, it would be a potentially expensive exercise, for which costs are sought to be paid from the fund, which may not lead to any resolution due to the generality of its terms. It is necessary for any question about which direction is sought, to be put in context so that the Court is asked to determine issues of real controversy.
5. As to the Commercial List Statement itself:-
 - (a) paragraph 3(a) estimates a trial time of fewer than 5 days – but it is not at all clear what issues will require a trial. As we understand it, there are no factual matters in dispute between our respective clients, and if the only matters for determination are issues of the operation of the Order of Dalton J, then we anticipate that the question might be determined in the Applications List – or perhaps in a hearing occupying not more than a day. Please tell us what your clients say is the scope of the issues in dispute;
 - (b) the Commercial List Statement refers to an Affidavit of Mr Tiplady – but we have not yet received that Affidavit. If the Affidavit is to exhibit only a copy of your correspondence of 19 September 2014, please let us know;
 - (c) paragraph 6 remains incomplete – if there are special directions sought by your client, you might kindly let us know.

As you will see from this correspondence, there is a great deal of uncertainty around the nature of your client's proposed Application and the questions the Application is intended to answer.

Respectfully, there needs to be a greater definition of the issues that the Court needs to determine, otherwise as it stands, the application is more in the nature of a hypothetical which the Court is unlikely to entertain. A greater definition of issues should also minimise any potential cost to the fund.

We would be pleased to discuss these issues in conference, should you wish, or if you would prefer to explain in writing the proposed foundation and purpose of your clients' application, we would be pleased to consider it.

Yours faithfully



David Schwarz
Tucker & Cowen

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cc: Mr Peter Bowden, Clayton Utz

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Sean Russell

From: Michelle Voser [mvoser@tuckercowen.com.au] on behalf of David Schwarz [dschwarz@tuckercowen.com.au]
Sent: Friday, 30 January 2015 2:30 PM
To: Stephen Russell
Cc: Ashley Tiplady; Sean Russell; David Schwarz
Subject: LM Investment management Limited (In Liquidation) (Receivers & Managers appointed) ("LMIM") - LM First National Income Fund ("LMIF") - Respective Roles of LMIM and Mr Whyte in the winding up of the FMIF
Attachments: Letter to Russells Lawyers (TCS00928568).PDF
Follow Up Flag: Follow up
Flag Status: Flagged
Saved: -1

Dear Colleagues

Please find **attached** correspondence.

SENT ON BEHALF OF DAVID SCHWARZ, PARTNER

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Our reference: Mr Schwarz/Mr Hancock

30 January 2015

Your reference: Mr Russell

Russells Lawyers
Brisbane

Email: srussell@russellslaw.com.au

cc: atiplady@russellslaw.com.au
seanrussell@russellslaw.com.au

Dear Colleagues

LM Investment Management Limited (in liquidation) (Receivers & Managers appointed) ("LMIM")
LM First Mortgage Income Fund ("FMIF")
Respective Roles of LMIM and Mr Whyte in the winding up of the FMIF

We refer to your letter of 21 January 2015.

Preliminary remarks

Our client is surprised by your reference to an "oppositional attitude" on the part of our client, and to a suggestion that our client is resistant to any cooperation with your clients, the liquidators of LMIM. As you would be aware, in the period following our correspondence of 20 November 2014, there were 'without prejudice' discussions between our respective clients; our client has also spoken on an 'open' basis with your clients in relation to various matters arising in the course of the winding up of the FMIF to progress matters in relation to the winding up in a co-operative manner. While our client's understanding of the effect of the Orders of Dalton J dated 21 August 2013 ("the Order") is that LMIM is to have a limited role (if any) in the winding up of the FMIF, our client has been, and remains, prepared where appropriate to consult with Mr Park and Ms Muller as the liquidators of LMIM in relation to the winding up.

We are also surprised at the suggestion that there has been delay on the part of our client in addressing any issue concerning the operation of the Order. Our client's understanding of the effect of the Order providing for his appointment has been explained in correspondence from our client very shortly after his appointment, directly to your clients on 26 and 28 August 2013 (the latter correspondence addressing in detail certain particular functions that had been mentioned or raised by your clients). Although our client invited your clients to explain in writing any questions requiring clarification, it was not until your letter of 19 September 2014 (received on 25 September 2014) that your clients' contentions were articulated.

Our client remains willing to meet with your clients (together with legal representatives if that is desired) to discuss any step that your clients consider should be taken by them in the winding up of the FMIF consistent with the terms of the Order, and if there is a divergence of opinion as to the operation of the Order as it concerns the proposed step, to seek direction from the Court. However, in the circumstances outlined as follows, it appears that your clients propose a different course to resolving any such issues.

Your colleagues, Mr Tiplady and Mr Sean Russell have proposed, in separate correspondence, an application to the Court for directions in relation to the role of your clients in the winding up of the FMIF. We have responded, by separate correspondence, to their letter of 19 January 2015 concerning that draft application. Your letter of 21 January 2015 is directed to the same

overarching issue about which it is proposed by your clients that direction be sought from the Court; namely, the respective roles of LMIM and Mr Whyte in the winding up of the FMIF.

Mr Whyte's Understanding of the Order

We make the following general comments in relation to your correspondence, and the propositions advanced in it.

1. First, your letter suggests that the winding up of the FMIF is to be undertaken by LMIM, "*subject to the particular tasks assigned to Mr Whyte*". There is, with respect, nothing in the Order of Justice Dalton to suggest that only particular tasks are to be assigned to Mr Whyte – rather, Mr Whyte is to "*take responsibility*" for the winding up of the FMIF. We do not see how the Order of Justice Dalton is to be construed so as to assign only certain particular tasks to Mr Whyte; as was said in our letter of 20 November 2014, our client understands the effect of the order providing for his appointment to be that he will, in substance and effect, conduct the winding up of the FMIF.

We invite you to explain, by reference to the Order and (if necessary) the reasons for judgment delivered by Justice Dalton from which the Order was drawn, the basis for the contention that Mr Whyte has been assigned only particular tasks, and to identify the particular tasks said to be assigned to him by reference to those documents.

2. The powers conferred upon Mr Whyte by the order are extensive – he has been appointed to take responsibility for ensuring the winding up of the FMIF in accordance with its constitution. As such to the extent that LMIM had an ongoing role in relation to the winding up it would still have to be under Mr Whyte's direction. (He has also been appointed as Receiver of all the property of the FMIF; for that purpose, he has been granted the powers set out in section 420 of the *Corporations Act 2001* (Cth) ("the Act") together with the specific additional powers conferred by paragraph 7 of the Order.

We turn now to the five particular matters that are said to arise, as identified in your letter of 21 January 2015.

1. Liquidator's Power to Pay Creditors

Our client does not cavil with the notion that the LMIM liquidators may call for and adjudicate upon proofs of debt submitted by creditors of LMIM. LMIM is in liquidation and, as regards the affairs of LMIM itself, the liquidators are vested with the powers conferred by section 477 of the Act.

However, that is not to say that the liquidators of LMIM may thus automatically exercise those powers in respect of property of the FMIF; they may not.

Any claim by LMIM, or by any creditor of LMIM, to payment out of the property of the FMIF rests upon LMIM's indemnity from the property of the FMIF. Of course, the way in which a trustee's right of indemnity from trust assets is to be given effect in the context of the winding up of an insolvent corporate trustee remains, to some extent, unsettled; but you would no doubt agree that it is now reasonably well established that a "trust creditor"¹ is entitled in certain circumstances to subrogate to the trustee's right of indemnity from trust assets and that the right of indemnity itself may be imperilled in certain circumstances, so that the question of whether a trust creditor is entitled to payment from trust assets is not always easily answered.

In these circumstances, where the assets of the FMIF are not under the control of the liquidators of LMIM, the proof of debt procedure may be, but is not necessarily, an appropriate means for dealing with the claims of creditors where those claims concern payment from the assets of the FMIF. There may be another, more appropriate,

¹To use imprecise but convenient language

mechanism for ascertaining and determining such liabilities, and whether the assets of the FMIF should be applied to satisfy them.

In short, whatever powers may be conferred upon the liquidators of LMIM to deal with property of LMIM, the effect of Mr Whyte's appointment as Receiver of the property of the FMIF (and, of course, the appointment of the DB Receivers) means that the LMIM liquidators are not in a position to, and do not have the right to, exercise any powers in respect of property of the FMIF. We would not have thought that to be a controversial proposition; if it is, please let us know.

2. Proofs of Debt

As mentioned above, our client does not dispute that your clients, as liquidators of LMIM, may call for and adjudicate on proofs of debt and claims against LMIM. However, for the reasons explained above, that is not to the point if, in connection with those claims, creditors seek payment out of the assets of the FMIF. That property is under the control of the DB Receivers and (once their appointment comes to an end) of Mr Whyte.

Furthermore, Mr Whyte has, by the order, been charged with responsibility for the winding up of the FMIF. In our client's letter to your client Ms Muller, of 28 August 2013, Mr Whyte referred to the decision in *Re: Stacks Managed Investments Limited*², in which the process of the winding up of a scheme was said to include the ascertainment and payment of liabilities incurred on behalf of the scheme. That is consistent with our understanding of what is meant by the winding up of a scheme; if it does not accord with your clients' understanding, please let us know.

In those circumstances, while it may be that the proof of debt procedure is an appropriate means of ascertaining those liabilities, it may be that another mechanism should be employed, such as the implementation of a regime for ascertaining and determining those liabilities in accordance with directions of the Court given to Mr Whyte, on his application.

In any event, any debate about the calling for proofs of debt or payment of creditors is premature. These questions do not yet arise in the winding up of the FMIF – there have been few claims made or notified to Mr Whyte relating to liabilities claimed to have been incurred prior to the winding up of the FMIF, and it is not suggested (in your correspondence or otherwise) that the winding up of the FMIF has reached the stage where those liabilities should be ascertained and payments made.

3. Insurance

Numbered paragraph 3 in your letter refers to "*the matter of LMIM's insurance.*" We regret that it is not clear to us what is meant by that paragraph. Could you please clarify the particular matter you are referring to or is it a comment made in anticipation of the outcome of proceedings that have just been issued.

Could you further clarify how that relates to an allocation of functions or responsibilities as between your clients and ours in respect of the FMIF; it is not suggested that Mr Whyte is seeking to manage the dealings between LMIM and its insurer. If there is an issue that has escaped our understanding, please enlighten us.

As to the matter of seeking leave under section 500 of the *Corporations Act*, we are instructed that this is a matter that is being attended to by Gadens Lawyers on behalf of Mr Whyte, and that your clients will receive proper notice, if they have not already.

² [2005] NSWSC 753

4. **MPF Proceeding**

Mr Whyte has commenced proceedings (BS12317 of 2014) (the "MPF Proceeding"), in the name of LMIM as responsible entity for the FMIF, against a number of defendants including LMIM and the current trustees of the LM Managed Performance Fund. We do not act for Mr Whyte in those proceedings, as you know.

It does not appear to be suggested by your letter that Mr Whyte is not vested with the power to commence the MPF Proceeding, as part of the realisation of the property of the FMIF. The Order, by paragraph 7, expressly empowers our client to commence proceedings in the name of LMIM as responsible entity for the FMIF so that is unsurprising. The commencement of the proceeding does not, therefore, appear to raise any question of demarcation of responsibilities as between Mr Whyte and LMIM or its liquidators.

Insofar as you raise the prospect of an uncommercial transaction claim, which involves questions of whether LMIM was insolvent at the relevant time, Mr Whyte would be pleased to receive or discuss with you any evidence your clients may have in that regard.

5. **Payment of Debts of LMIM**

This issue has been addressed above, in the context of the liquidators' power to pay debts and the proof of debt regime; we refer you to what is said above in that regard.

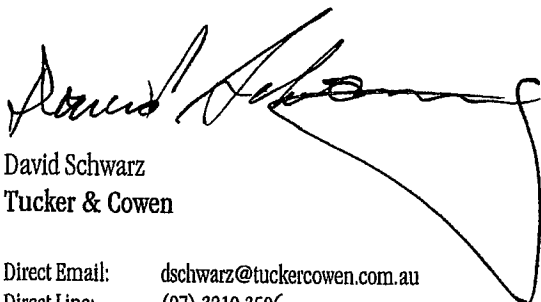
In our client's view, it is not only your clients who are charged with the payment of the debts of the FMIF (relating to the period prior to the appointment of your clients and subsequent winding up of the FMIF), given the effect of the appointment of our client pursuant to the Order. That said, this is not an issue which has yet arisen, given the continuing appointment of the DB Receivers.

We have thus addressed the issues raised in your letter of 21 January 2015.

Your letter dated 19 September 2014 mentioned a broad range of responsibilities by reference to the Constitution of the FMIF and the Act; many of those are of no, or little, relevance in a winding up of the FMIF. Although we have not directly traversed the contentions made in that letter, we consider that those matters have been largely addressed now by this correspondence, our letter of 20 November 2014, and the correspondence from our client to your clients in August 2013. If there remain any particular issues or contentions that your clients consider remain to be dealt with, please let us know.

Should you wish to discuss the matter, please call me.

Yours faithfully



David Schwarz
Tucker & Cowen

Direct Email: dschwarz@tuckercowen.com.au

Direct Line: (07) 3210 3506

Liability limited by a scheme approved under Professional Standards Legislation.

Our Reference Jacqueline Ogden 201401822
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gadens

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2 April 2015

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Attention: Ashley Tiplady and Sean Russell

gadens.com

By email ATiplady@RussellsLaw.com.au; SeanRussell@russellslaw.com.au

Dear Colleagues

**LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 ("LMIM") as Responsible Entity for the LM First Mortgage Income Fund ARSN 089 343 288 ("FMIF") -v- LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461 & Ors
Supreme Court of Queensland Proceeding No. 12317/14 ("Proceedings")**

We continue to act on behalf of the plaintiff in the above Proceedings, instructed by the court appointed receiver of the LM First Mortgage Income Fund, David Whyte.

We refer to your letters of 24 March 2015 and today and note you have confirmed you now act for the liquidators, Mr Park and Ms Muller, and the seventh defendant, LMIM.

We also refer to the **enclosed** draft order circulated to the Commercial List Judge and the parties to the Proceedings today and your earlier correspondence.

In respect of your letter of 24 March 2015, we are instructed that our client:

- (a) has no objection to your client supervising access by the director defendants of the books and records of LMIM;
- (b) agrees that supervision of access to and inspection of the books of LMIM is required.

It is for these reasons we have proposed those orders contained in the enclosed draft order.

Would you please let us know your client's attitude to the draft orders proposed as soon as possible.

In relation to your correspondence of today, we are instructed as follows:

- (a) **Commercial List Application** – to note your client's present position in respect of order 1. As to the estimated trial length and how the Proceedings can be regarded as a "special case", as stated in our Commercial List Statement, given the defences to the proceedings have not yet been filed and served, the estimated length of the trial is uncertain. However, at this stage, our client acknowledges that a trial may potentially take more than 10 days. In these circumstances, the reasons our client considers that the Proceedings fall within the circumstances of a "special case" include, but are not limited to, the following:
 - a. the Proceedings involve issues of a general commercial character as set out in section 4.1 of the Commercial List Statement, for that reason our client considers it appropriate that the matter be listed on the Commercial List;
 - b. the Proceedings concern funds of a registered managed investment scheme.
 - c. the Proceedings have been commenced on the instructions of the court appointed receiver of the property of the FMIF;

Liability limited by a scheme approved under professional standards legislation.

- d. there are 4,500 investors in the FMIF and it is in their interests that the Proceedings have been commenced.
- (b) **Proposed orders** – we note your proposal in respect of orders 3(a)(iii), (iv), (d) and (e). Our client does not agree to the proposed orders. We are instructed to seek at the hearing on Wednesday, 8 April 2015 those orders contained in the enclosed draft order which was circulated today.
- (c) **Security for costs** – the proposal to set aside the amount of \$1,000,000 to satisfy adverse costs orders made against the plaintiff has been made in light of the fact that:
- a. the claim is being brought by LM in its capacity as the responsible entity of the FMIF;
 - b. the assets of the FMIF are conservatively valued in the amount of at least \$75 million;
 - c. in addition to the \$1million already indicated as to be set aside by our client, our client will retain certain funds to meet the liabilities of the FMIF, including contingent claims that may arise from litigation;
 - d. the Proceedings are in their very early stages, (noting the defences of the parties have not yet been filed).

In view of the above, our client considers the amount proposed at this stage is reasonable and that it would be premature (and unnecessary) to bring any application for security for costs.

We are also instructed to advise that our client does not currently have an intention to distribute any funds to investors of the FMIF and that, when and if he does, he will consider whether additional amounts need to be held on trust for costs in the proceedings which will depend on a number of factors, including at what stage the proceedings are then at.

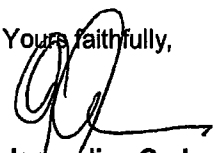
Notwithstanding the above, if your clients intend to proceed with making such an application, please confirm your clients will not take any steps to make such an application for security for costs without first giving us 7 days written notice of your intention to do same.

- (d) **Access to books and records of LMIM** – we refer to the enclosed draft order and our comments above in relation to this matter.

The requests for inspection of books of LMIM pursuant to section 198F of the *Corporations Act 2001* have (to date) been received from the second defendant (represented by Rodgers, Barnes & Green Lawyers) and the third and fourth defendant (both of whom are represented by James Conomos Lawyers).

In relation to the record of LMIM in its own capacity (referred to in your letter of 24 March 2015), we enclose for your records a copy of correspondence from Allens dated 28 May 2014 (in particular at item 5) which confirmed your clients consented to our client being provided with access to that record. Your clients were also copied in to this correspondence directly. We further note that Allens sought the liquidators consent to providing KordaMentha with access to that material and we enclose for your records a copy of Allens letter dated 28 May 2014 confirming the liquidators had provided that consent.

Yours faithfully,


Jacqueline Ogden
Associate

Enc.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES
OF THE LM MANAGED PERFORMANCE FUND**

ORDER

Before: Jackson J
Date: 8 April 2015

ORDER
Filed on Behalf of the Plaintiff
Form 59 Rule 661

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
BNEDOCs 14304259_2.doc

Initiating document: Application filed by email to the Commercial List Manager on 12 March 2015

THE ORDER OF THE COURT IS THAT:

1. That the proceeding be placed on the Commercial List.
2. That the plaintiff be granted leave *nunc pro tunc* pursuant to rule 72 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)*, to the extent that such leave is necessary, to take any further step in and continue with the proceeding against the first defendant, Peter Charles Drake.
3. That directions be made for the future conduct of the proceeding as follows:
 - (a) that the first to fourth defendants and the sixth defendant (collectively, referred to as the **Director Defendants**) are to file and serve any interlocutory application (**interlocutory application**), together with any further supporting affidavits, in relation to the following matters within 7 days of the listing of this matter on the Commercial List:
 - (i) whether the Director Defendants are excused from compliance with, and from the operation of, rules 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the UCPR;
 - (ii) whether, if the Director Defendants are excused from compliance with, and from the operation of rules 149(1)(b), 149(1)(c), 150, 157, 165 and 166 of the UCPR, the defences of the Director Defendants, at a minimum, must:
 - (A) state with respect of each allegation of fact in the statement of claim, whether the allegation is admitted, not admitted or denied; and
 - (B) give notice of any intention to rely upon any statutory defence or ground of dispensation;
 - (iii) the timing of delivery of the notices of intention to defend and defences of the Director Defendants;
 - (iv) the timing of delivery of the plaintiff's reply to the Director Defendants' defences;
 - (b) that the plaintiff is to file and serve any material in response to the interlocutory application within 7 days from service of the interlocutory application and supporting affidavits;
 - (c) the interlocutory application be listed for hearing at a date convenient to the Court as soon as possible within 7 days of the step in paragraph (b) and in any event by no later than [*date to be inserted upon the hearing of this Application*];
 - (d) the seventh defendant file and serve its notice of intention to defend and defence by on or before 22 April 2015;
 - (e) the plaintiff file and serve its reply to the defence of the seventh defendant by on or before 6 May 2015.
4. That the orders made by His Honour Justice Daubney on 29 January 2015 in Supreme Court Proceedings numbered 3383 of 2013 (**29 January 2015 Order**) and undertakings provided

by David Whyte and the seventh defendant in those proceedings (**Undertakings**) be varied to the extent necessary to facilitate the inspection by the Director Defendants of the books of the seventh defendant, only in so far as those books are required to be provided for inspection for the purposes of these proceedings pursuant to section 198F of the *Corporations Act 2001* (Cth).

5. For the purposes of any inspection by the Director Defendants of the books of the seventh defendant in accordance with paragraph 4 of this order the process for such inspection is to be as follows:
 - (a) the seventh defendant, by its liquidators, is to make available for inspection (subject to supervision) an image of the server which stores the soft copy books of the seventh defendant which is in their possession and control for the purposes of the Director Defendants inspecting those books located on the server which are required to be provided for inspection for the purposes of these proceedings in accordance with section 198F of the *Corporations Act 2001* (Cth);
 - (b) to the extent necessary, if any books that are required to be provided for inspection to the Director Defendants for the purposes of these proceedings in accordance with section 198F of the *Corporations Act 2001* (Cth) are not able to be accessed by inspecting the server in accordance with paragraph 5(a) herein, the seventh defendant, by its liquidators, may request in writing that David Clout, the liquidator of LM Administration Pty Ltd (In Liquidation) and/or David Whyte, the court appointed receiver of the LM First Mortgage Income Fund, produce to the liquidators of the seventh defendant nominated hard copy books which are in the possession and control of Mr Clout and/or Mr Whyte for the purposes of the Director Defendants inspecting those hard copy books;
 - (c) in the event that any request is made by the liquidators of the seventh defendant pursuant to paragraph 5(b) above, and to the extent that the nominated hard copy records are in their possession and control and are required to be provided for inspection by the Director Defendants for the purposes of these proceedings pursuant to section 198F of the *Corporations Act 2001* (Cth), David Clout and David Whyte are authorised to and shall provide the nominated hard copy records to the liquidators of the seventh defendant within 5 business days of such request being made by the seventh defendant;
 - (d) the seventh defendant will make any hard copy books of the seventh defendant provided to them pursuant to paragraph 5(c) above available for inspection by the Director Defendants;
 - (e) any books of the seventh defendant that are required to be provided to the Director Defendants for inspection for the purposes of these proceedings pursuant to section 198F of the *Corporations Act 2001* (Cth) shall be made available for inspection by the liquidators of the seventh defendant within 14 days of the date of this order;
 - (f) the Director Defendants are to inspect the books and records of the seventh defendant within 14 days of them being made available for inspection by the liquidators of the seventh defendant.
6. The 29 January 2015 Order and the Undertakings otherwise remain in full force and effect.
7. The parties have liberty to apply on three days' notice or upon such shorter period of time as the Court thinks fit.
8. That the costs of and incidental to this application be the parties' costs in the proceeding.

Signed:

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Allens < Linklaters

28 May 2014

Mr David Whyte
BDO
GPO Box 457
Brisbane QLD 4001

By Email

Mr Simon Vertullo
KordaMentha
GPO Box 964
Brisbane QLD 4001

By Email

Dear Sirs

**LM First Mortgage Income Fund (the FMIF)
LM Managed Performance Fund (the MPF)
Bellpac litigation**

We refer to the letter we have received from Mr Whyte dated 15 May 2014 and the letter we have received from Mr Vertullo dated 21 May 2014.

We appreciate your attempts to resolve the basis on which our files are to be made available to each of you. We are keen to assist in resolving this as soon as possible and thought it might assist the parties to set out our understanding of the current position and the issues that seem, from our point of view, to require further consideration or clarification. Accordingly, we make the following points:

- 1 We note that each of your letters proposes certain (different) conditions governing access to the files. From what we can tell, final agreement in relation to those conditions has not yet been reached. As you will appreciate, we will need confirmation of that agreement.
- 2 Having said that, from a general standpoint it seems that, with the exception referred to at point 3 below, each of you is agreeable to us (Allens and Mr Monaghan) providing both of you with access to all of our files relating to the Bellpac litigation.
- 3 The exception is files where the client was only LM Investment Management Limited (*LM*) in its capacity as trustee of the MPF (we refer here to the first dot point in Mr Vertullo's letter).
- 4 We are now in a position to confirm there is one file that has the potential to fall within that exception. That file is Mr Monaghan's Bellpac file, as the client retainer in respect of that file was with LM in its capacity as trustee of the MPF. However, the file involved work that benefitted both funds. In those circumstances, Mr Monaghan considers it likely that LM in its capacity as trustee of the FMIF was also his client, and it is therefore the case that the exception may not ultimately apply. We appreciate that there may need to be further debate between you as to the status of that file.
- 5 Separately, there was one aspect of the Bellpac matter in which it is likely that Allens and Mr Monaghan acted for LM in its own capacity, being advice as to conflict issues which LM faced relating to the split of proceeds of the Bellpac litigation between the FMIF and the MPF. We note that LM's liquidators have consented to us providing Mr Whyte with access to our files in relation to the

Our Ref ADMB:AGPB:120398755
admb A0129408343v1 120398755 28.5.2014

Bellpac matter, which would include that material. In the circumstances, we consider it necessary to ask them whether they also consent to us providing Mr Vertullo with access to that material.

- 6 We also consider it necessary to ask McGrathNicol to confirm that they do not have any objection to us providing Mr Vertullo with access to documents on the same basis as they have consented to us providing Mr Whyte with such access.
- 7 Assuming those consents are forthcoming, and to ensure that we are not misunderstanding the position in light of the matters set out above, can you both please provide:
- (a) written confirmation that you are agreeable to Allens and Mr Monaghan providing both of you with access to all of our files relating to the Bellpac litigation; and
 - (b) written confirmation of the conditions agreed between you governing that access.
- 8 In the meantime, we will not take any step in relation to providing access to the files.
- 9 Finally, we note that the files are comprised of both hard copy and electronic documents. Once we reach that point, we assume that it would be most convenient for you if the electronic files were made available electronically, and the hard copy documents were made available for inspection. Can you please confirm.

If a meeting of all parties would assist to resolve any outstanding issues in relation to access to this material, we would be happy to attend such a meeting. Please let us know if that is required.

Yours faithfully



Alf Pappalardo
Partner
Allens



David Monaghan
Senior Associate
Allens
David.Monaghan@allens.com.au
T +61 7 3334 3511

cc The Liquidators
LM Investment Management Limited
c/- Ms Kelly Trenfield
Senior Managing Director
FTI Consulting
22 Market Street
Brisbane QLD 4000

By Email

cc Mr Joseph Hayes
Receiver and Manager
LM Investment Management Limited
McGrathNicol
Level 31 60 Margaret Street
Sydney NSW 2000

By Email

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28 May 2014

Mr David Whyte
BDO
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Brisbane QLD 4001
By Email

Mr Simon Vertullo
KordaMentha
GPO Box 964
Brisbane QLD 4001
By Email

Dear Sirs

LM First Mortgage Income Fund (the *FMIF*)
LM Managed Performance Fund (the *MPF*)
Bellpac litigation

We refer to our earlier letter today.

We confirm that we have now received, from FTI and McGrathNicol, the consent referred to in points 5 and 6 of that letter.

Yours faithfully



Alf Pappalardo
Partner
Allens



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Senior Associate
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Our Ref ADMB:AGPB:120398755
admb A0129411227v1 120398755 28.5.2014

TO THE INVESTOR AS ADDRESSED

30 January 2015

**LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED)
ARSN 089 343 288 ('the Fund' or 'FMIF')**

I refer to my previous reports and now provide my eighth update to investors in relation to the winding up of the Fund, as follows.

1. Position of the Secured Creditor and the potential claim by KordaMentha, the trustee of the LM Managed Performance Fund ("MPF")

As previously advised, even though the secured creditor has been repaid in full, the Receivers and Managers appointed by the secured creditor have advised that they are not in a position to retire until the potential claim by KordaMentha as the new trustee of the MPF is resolved.

I refer to my previous report which discussed the issues that KordaMentha were experiencing in obtaining some 227,000 documents from the Liquidators of LM Investment Management Ltd (In Liquidation) (Receivers and Managers Appointed) ("LMIM"), due to these either containing information confidential to other funds or that LMIM identified as "unknown" and where they are unsure if they relate to the MPF.

Since issuing my last report dated 16 October 2014 and in response to the closure of the LM office, I made an application to the Supreme Court of Queensland to enter into an agreement with LMA's Liquidator for direct access to the records held by LMA in so far as they relate to FMIF. This is discussed in more detail at section 3.5 below. In response to my application, KordaMentha made an application to the court for similar access in an attempt to resolve the issues with obtaining the remaining records.

Following a court hearing on 29 January 2015, KordaMentha will be granted access to all books and records subject to the execution of an undertaking to the court that they will not interrogate the records for anything other than for the MPF and will not use anything that does not relate to the MPF.

In my previous report, I notified investors that KordaMentha's solicitors have advised they have instructed Queen's Counsel in respect of two matters that involve potential claims against the assets of FMIF and that they are investigating further potential claims or if these will be pursued.

Since my last report, I have not received any further communications from KordaMentha in respect of the amount of the potential claims or if these will be pursued.

No specific claims have been made by KordaMentha against Deutsche Bank.

As discussed at section 3.2.1 below, on 17 December 2014, I filed a statement of claim in the Supreme Court of Queensland, against a number of parties including the MPF, in respect of the loss suffered by FMIF as a result of the amount paid to MPF in the Bellpac litigation matter. This claim is for in excess of \$20M.

2. Realisation of Assets

In my report dated 16 October 2014, I provided a summary of the assets to be realised. In the tables below, I summarise the assets realised since then and those remaining to be realised.

You will note from the summary below that meaningful progress has been made in the realisation of the assets including four of the retirement village assets being under contract. An offer had been accepted for a fifth retirement village however this has recently fallen through with the agent continuing negotiations with three other parties. Three sales are subject to unconditional contracts due to settle on 23 April 2015. The other sale is subject to one condition which is to be satisfied within 90 days with settlement 7 days thereafter.

Assets realised since 30 September 2014

| Location | Description of asset |
|----------|--|
| QLD | The development is an eight stage project to provide 116, 3 or 4 bedroom townhouses. Since my last report the remaining 2 units of stage 7 have settled along with all 12 of stage 8. |
| NSW | The security is comprised of 4 units within a larger purpose built commercial building. Two adjoining units are occupied by a dance and yoga studio with the other two units unoccupied. A sale of the occupied units was completed in June 2013. Since my last report the remaining two units have settled. |

Assets with partial realisations

| Location | Description of asset | |
|----------|---|----------------|
| QLD | 90 strata titled hotel rooms. Since my last report which included the position as at 30 September 2014, when 7 units remained, a further 3 units have settled with 4 remaining. | On the market |
| WA | The development has been subdivided into three super lots. The first lot was sold in January 2014. A second lot was under contract however the conditions of the contract were not met and therefore it was terminated. The two remaining lots are currently on the market. | On the market |
| QLD | Residential land subdivision. 80 lots with operational works approval and additional land (approx. 57ha) with or pending development approval together with one residential property are currently on the market. | On the market |
| NSW | The development comprises of 83 strata titled office lots with 63 of these units charged to the Fund. Of the 63 units, 59 remained as at 30 November 2013. Since that time, a further three units have been sold. | Under contract |

| Location | Description of asset | Status |
|----------|--|------------------------------|
| | Following an extensive marketing campaign in June/July last year, an offer was received to purchase the remaining units in one line. This was originally due to settle in late November 2014, however an extension was granted to the purchaser until 22 December 2014 for the unleased units (monies received on 19 December 2014) and until 30 January 2015 for the leased assets. | |
| QLD | 72 strata titled unit resort complex with management rights. At the time of my appointment, 57 units remained. Following a marketing campaign in June/July last year, 19 units have settled with 5 due to settle in late January/early February. Proceedings commenced by the body corporate against the builder were settled late last year. | Under contract/on the market |
| QLD | A supported living community, comprising of 64 independent living units with the proposed development of a further 76 units. Of the current 64 units, 15 are vacant. | Under contract |
| NSW | A supported living community, with 83 completed independent living units. 22 units are currently vacant. | Under contract |
| QLD | A supported living community, with 37 completed independent living units plus balance land for further development. 4 units are currently vacant. There are also a further 7 completed detached dwellings and a partly constructed subdivision of c.100 townhouse/small dwelling lots under community title plus residual land. | Under contract |
| VIC | A supported living community, with 69 completed independent living units (5 vacant) and a further 129 proposed. | On the market |
| TAS | A supported living community, with 29 completed independent living units (no vacancies) and a further 15 proposed. | Under contract |

Assets to be realised

| Location | Description of asset | Status |
|----------|--|-------------------------------|
| QLD | Two supported living communities. One currently has 62 completed units (12 vacant) with a further 106 proposed. The other has 110 completed units, with 16 units currently vacant. | Borrower in control of assets |

3. Other Potential Recoveries/Legal Actions

My previous report identified various matters which required additional investigation to determine whether there were any potential legal actions for dealings which occurred prior to my appointment as

Receiver. I provide an update in relation to investigations undertaken to date, legal proceedings on foot and further work to be done, as follows:

3.1 Public Examination

In my report dated 16 October 2014, I confirmed that I had been successful in obtaining the approval from ASIC as an eligible applicant under the Corporations Act 2001 (the Act) to conduct a Public Examination (PE) and I had instructed my solicitors to commence preparation for a PE.

On 17 November 2014, I filed in the Supreme Court my application to conduct a PE in relation to the financial audits undertaken of the FMIF. The persons to be examined are the auditors and certain directors of LMIM.

The application was to be heard on 21 November 2014 however, the Liquidators' of LMIM sought an adjournment of the hearing of the application on the basis that they needed more time to consider the application and advised me that it may be more appropriate for the Liquidators to bring the application to conduct the PE and not me. The hearing was adjourned for one week and after correspondence with the Liquidators' solicitors, the application was not opposed by the Liquidators and the application was granted on 27 November 2014.

Following the issue of the court order, my solicitors have been liaising with the Magistrate's Court and senior counsel who is to conduct the examinations to determine a suitable date for the parties to be examined and to produce documents in their possession. This will be on 16 March 2015 with the examination of the parties under oath likely to follow four to six weeks thereafter.

3.2 Bellpac Proceedings

3.2.1 Settlement of Gujarat proceedings

I refer to my previous reports to investors. I summarise the matter as follows:

- In November 2010, proceedings against Gujarat NRE Minerals Limited (Gujarat) were settled for a total amount of approximately \$45.6M;
- As MPF funded the majority of the costs of the litigation, the settlement proceeds received in 2011, were shared between the funds on the basis of a 65%/35% split;
- According to the security held by FMIF and MPF over the property the subject of the litigation, FMIF held first priority to all of the proceeds of the settlement and was entitled to all of the settlement proceeds;

On 17 December 2014, I filed a statement of claim in the Supreme Court of Queensland claiming \$15,546,147.85 plus interest (calculated from mid/late 2011 with the claim in excess of \$20M) being the loss suffered by FMIF as a result of the amount paid to MPF, against the following parties:

- Peter Drake;
- Lisa Darcy;
- Eghard Van Der Hoven;
- Francene Mulder;
- John O'Sullivan;
- Simon Tickner;
- LMIM; and

- The trustees of MPF

The date the defendants must file a defence is 28 days after deemed service on the relevant party. Since lodging the claim, Peter Drake has presented a debtors petition and is now an undischarged bankrupt. Two other directors are yet to be served as their whereabouts is not known and an application is currently being prepared for leave to proceed against LMIM as the company is in liquidation.

In November 2014 ASIC commenced civil penalty proceedings in the Federal Court of Australia against Peter Drake, Francene Mulder, Eghard Van Der Hoven, Simon Tickner and Lisa Darcy. ASIC alleges Mr Drake used his position to gain an advantage for himself and the former directors breached their director's duties for failing to act with the proper degree of care and diligence regarding transactions involving the MPF. The ASIC proceedings have been adjourned to February 2015.

3.2.2 Other Bellpac litigation

a. \$2 million of Wollongong Coal Ltd (WCL) - Convertible Bonds

I refer to my previous reports to investors. I summarise the matter as follows:

- FMIF has first ranking security over the assets of a borrower, Bellpac Pty Ltd (Bellpac) which is now in liquidation;
- In August 2008 \$10 million of Bonds were issued by WCL to Bellpac however, Bellpac transferred these Bonds to another party who further transferred to other parties;
- The proceedings by Bellpac and its Liquidators in regard to \$2 million Bonds (still in the name of Bellpac) commenced in January 2010. In 2012 Bellpac was successful in obtaining Orders that Bellpac is the true owner of the Bonds;
- The decision was appealed by the defendants in the Full Federal Court and the High Court which were unsuccessful;
- WCL is a publicly listed company and was formerly called Gujarat NRE Minerals Ltd;
- The Liquidators applied for conversion of the Bonds with a face value of \$2,000,000 into shares however, WCL failed to issue the shares as required and did not otherwise respond. The terms of the Bonds provide that the Bonds can be redeemed for their face value if WCL is unable to issue the shares. The Liquidators then applied to enforce the terms of the bonds and demanded that WCL redeem the bonds for their face value being \$2 million plus interest. Again there was no response.
- On 12 September 2014, WCL made an offer to settle the redemption claim which was rejected as it was too low;

Further developments are as follows:

- On 23 October 2014, the Liquidators served a creditor's statutory demand (CSD) on WCL for \$2.9 million being the face value of the bonds plus interest;
- On 28 October 2014, an offer was received from WCL to settle the CSD claim payable in 12 monthly instalments commencing in mid March 2015. This offer was rejected as there was no security for the payment of the settlement sum and the total amount was too low;
- On 7 November 2014, the Liquidator made a counter offer to settle the CSD claim, if paid by the expiry date of the CSD in late November 2014;

- On 11 November 2014, WCL filed an application to set aside the CSD with a hearing date of 13 February 2015. WCL argue that it was always able to issue the shares and remains able to do so. On the same day, WCL made an increased offer to settle the CSD claim payable in 12 monthly instalments commencing in mid March 2015. That offer was rejected as it did not provide any security for the payments;
- A counter offer to settle the claim was made by the Liquidators to settle the CSD claim which lapsed on 23 December 2014 without a response from WCL;

I am continuing to liaise with the Liquidators who are attempting to negotiate a commercial outcome to this claim.

As FMIF will be the beneficiary of the funds recovered from the \$2 million bonds claim after costs, FMIF is funding the Liquidator's care and preservation costs of realising the Bonds for the benefit of investors.

Further developments in relation to this claim will be provided in my next report to investors.

b. \$8 million of WCL Convertible Bonds

I refer to my previous reports to investors. I summarise the matter as follows:

- The proceedings by Bellpac and its Liquidators commenced in July 2012 seeking orders that Bellpac is the true owner of the \$8 million Bonds and the recovery of \$4.7 million transferred by Bellpac (pre Liquidation) to two of the defendants;
- If the Liquidators are successful in obtaining a declaration from the Court that Bellpac is the true owner of the Bonds, FMIF will be the beneficiary of the funds recovered by the Liquidator from realising the Bonds, after costs. In order to protect the interest of FMIF in Bellpac's claim to title to the Bonds, FMIF is continuing to fund the Liquidators' in the proceedings.
- At the Directions Hearing on 7 October 2014, the Court allocated a date for a five day trial to commence in March 2015. The Liquidators, their solicitors and counsel are currently preparing for the trial.

Further developments in relation to this claim will be provided in my next report to investors.

c. Proceedings against Bellpac Receivers, LMIM, The Trust Company Ltd ("the Parties")

I refer to my previous reports to investors. I summarise the matter as follows:

- In February 2013, parties including the second mortgagee over Bellpac commenced proceedings against the Parties in relation to the alleged sale of the Bellpac property at an undervalue. The property that was sold formed part of the settled proceedings outlined at Section 3.2.1 above;
- LMIM as RE for FMIF and the other respondents filed applications seeking security for costs from the applicants which was heard on 23 October 2014;

Further developments are as follows:

- On 15 December 2014, the decision in relation to the security for costs applications was handed down in favour of the applicants. The plaintiffs are required to pay \$550,000 into Court before the proceedings can continue;

- The plaintiffs were also ordered to pay the costs of the applicants;
- A Directions hearing is set down for early February 2015 however, will be vacated if the plaintiffs do not pay the security for costs.

3.3 Other Potential Claims against LMIM and related Parties

3.3.1 Management Service Agreements with LM Administration Pty Ltd (in Liquidation) (LMA)

I refer to my previous reports to investors. I summarise the matter as follows:

- The audited accounts for the FMIF show that a total of approximately \$10.2M was paid to LMA (for the years ended 30 June 2011 and 30 June 2012) for loan management fees in replacement of appointing external receivers;
- Amounts totalling approximately \$2M were paid to LMA for the period from 1 July 2012 to 19 March 2013.
- Legal and accounting advice was received by LMIM in relation to the charging of these fees;
- Loan management fees were also paid for the period 19 March 2013 to up to June 2013

Whilst I consider the directors of LMIM may have breached their duties in entering into these arrangements and that there may be a claim against them and/or LMA, I do not currently consider it commercially worthwhile to pursue these claims bearing in mind:

- I have commenced proceedings against the directors for an amount in excess of \$20m (including interest) in respect of the claim discussed at section 3.2.1 above;
- LMA is in liquidation with no dividend expected to creditors at this stage.

3.3.2 Distribution to Class B Unit Holders

I refer to my previous reports to investors. I summarise the matter as follows:

- During the financial year ended 30 June 2012 distributions of approximately \$16.9M were made to Class B unit holders at a time when class A and C unit holders did not receive any distributions, apart from hardship distributions;
- Class B unit holders, relate to the three feeder funds of FMIF;
- I am unaware of any rights of Class B unit holders which would entitle them to a priority distribution over other classes of unit holders in the Fund;
- The auditors qualified the financial statements in regard to this transaction;
- As a result of the distribution and reinvestment of a major portion of that distribution into units in FMIF, Class B unit holders increased their units in the fund from 44.33% to 46.14% at the expense of the Class A & C unit holders. This will result in the Class B unit holders receiving a greater amount in the winding up of the Fund;
- During the financial year ended 30 June 2013 (prior to the capital distributions in February and June 2013), the Feeder funds received further distributions of approximately \$2.6 million;
- The calculation of the percentage interest of the feeder funds in FMIF as stated in the 30 June 2012 audited financial statements has to date not been reconciled however, we expect this to be clarified once the auditors working papers and or LM's records are obtained in due course via the public examination.

Further developments are as follows:

- As advised in Section 3.1 above, a public examination will be undertaken in March/April 2015 and part of the investigations being undertaken will include the above mentioned transactions in 2012.

I continue to undertake investigations in relation to the above matters and these will be progressed through the conduct of the PE.

3.3.3 Changes to Constitution

I refer to my previous reports to investors. I summarise the matter as follows:

- The fund's constitution was amended several times since its initial execution on 24 August 1999;
- The terms of the constitution stipulate that it may be modified or repealed or replaced with a new constitution, by:
 - Special resolution of the members of the scheme; or
 - The Responsible Entity, if the Responsible Entity reasonably considers the change will not affect Members' rights.
- I am not currently aware of any special resolutions passed by members resolving to amend the terms of the constitution;
- I am aware of several changes to the permitted loan to valuation ratio ('LVR') of the fund commencing with an LVR of no more than 66.66% (Constitution dated 24 August 1999) to an LVR permitted not to exceed 85% of the value of the security property (after a loan has settled and where the RE considers it is in the best interests of the members)
- Further investigation is required to determine the effect of these amendments and whether or not there may be potential legal claims arising from that;

My investigations in relation to the above matters have not been concluded. I have yet to gain access to certain records and this has been made more difficult due to the comingled nature of the records. I refer to my application to Court to gain unfettered access to records which concern FMIF in Section 3.5 below.

I am mindful however, of the commerciality of conducting further extensive investigations given that any benefit to investors of potential legal claims arising from the above matters may only be recovered if an insurance policy responds to same and which may be entirely diminished if I am successful in the Bellpac/MPF claim (see Section 3.2.1 above) or from claims made against the policies following legal actions by other LM Funds. Accordingly, I will not carry out any further investigations in relation to this matter at this stage while the Bellpac/MPF claim proceedings are on foot.

3.3.4 Fund Valuation Policy

I refer to my previous reports to investors. I summarise the matter as follows:

- A review of the fund's compliance plan dated 16 March 2011 details the following regarding the fund's valuation policy:
 - Valuations may only be carried out by panel valuers; and

- An updated valuation will generally be required for commercial loans at 24 month intervals and construction loans at 12 month intervals.
- From my preliminary enquiries, it appears that the Responsible Entity did not generally obtain updated professional valuations after the initial advance was made. Instead, in the majority of cases, they relied upon discounted cash flows prepared by management on the feasibility of a project.

I refer to my comments in Section 3.3.3 above about the commerciality of incurring further costs when there may be no further return to investors. I therefore will not undertake any further investigations in relation to this matter at this stage while the Bellpac/MPF claim proceedings are on foot.

3.3.5 External Valuations

I have continued a review of the loans where material losses have occurred to ascertain whether the valuations relied on were too high and if there was negligence by the valuer which contributed to the losses.

My investigations are ongoing in this respect.

3.4 Auditors

I confirm that I have not at this stage been able to progress my investigations due to an inability to gain access to the auditor's working papers and all relevant FMIF records. My investigations will be facilitated by undertaking the public examinations due to take place in March/April 2015.

Once my investigations are complete in relation to each of the above matters, I will update investors accordingly.

3.5 Application to Court for Access to FMIF records

I have previously raised the difficulties faced with the intermingled LM records held by LMA and gaining access to the records that concern the FMIF to enable me to undertake my obligations to wind up the fund.

Until now, access to records requested by me have been via a screening process conducted by LM staff under the direction of LMA's Liquidator and in some cases, a requested document would need to be redacted before it was made available to me which can be a time consuming process.

In November 2014, in order to save costs, and with the agreement of the Liquidator of LMA who employed LM staff and consultants, McGrathNicol and I decided to close the LM office at Surfers Paradise on 23 December 2014 and terminate the employment/engagement of the LM staff.

On 2 December 2014, I made application to the Supreme Court of Queensland to enter into an agreement with LMA's Liquidator for direct access to the records held by LMA so that I could obtain records that concern the FMIF. That proposed arrangement involves certain of my nominated staff (and certain ex LM staff engaged by me) having direct access to the LM databases pursuant to strict undertakings by them to the Court not to deal with any non FMIF records.

Following court hearings on 12 December 2014, 15 December 2014 and 18 December 2014, a temporary access regime was agreed until 29 January 2015 with the hearing adjourned until that date.



At the hearing on 29 January 2015, full access to the records was approved by the court subject to undertakings being provided to the court not to interrogate the records for anything other than the FMIF and not to use anything that does not relate to the FMIF.

4. Closure of LM Office/Reduction in costs

As discussed above, following consultation with the relevant parties, a decision was made to close the LM office on 23 December 2014.

Prior to the office closure, the Fund had been incurring operating costs of approximately \$1.8m per annum in respect of the costs of employing staff and consultants to assist in managing down the loan book, plus premises and equipment costs.

Three members of the former LMA staff have been retained on a short term basis in order to assist McGrathNicol and ourselves with the realisation of the remaining assets.

5. Estimated Return to Investors

Based on the professional valuations, offers received and unconditional contracts entered into for the properties charged to the Fund, I provide an estimated return to Investors of between 15 and 17 cents in the dollar as at 31 December 2014, calculated as follows:

| | Low | High |
|---|-------------------|-------------------|
| | \$ | \$ |
| Cash at Bank | 32,711,799 | 32,711,799 |
| Funds held in trust | 1,716,388 | 1,716,388 |
| Estimated selling prices of properties to be sold | 50,774,673 | 59,920,385 |
| <i>Less:</i> | | |
| Selling costs (2.5% of sale price) | (1,333,312) | (1,569,055) |
| Land tax & rates | (250,000) | (250,000) |
| Other unsecured creditors | (9,380,753) | (4,451,688) |
| FTI Fees & legal costs claimed (subject to approval) | (3,394,747) | (3,394,747) |
| Receivers and Managers' Fees (McGrathNicol) | (253,965) | (253,965) |
| Receiver's fees & outlays (BDO) | (937,768) | (937,768) |
| Estimated net amount available to investors as at 31 December 2014 | 69,716,262 | 83,562,396 |
| Total investor units | 478,273,531 | 478,273,531 |
| Estimated return in the dollar | 0.15 | 0.17 |



The low range has increased from 12 cents at the date of my last report primarily due to ongoing realisations being higher than the low value and unconditional contracts having been entered into for three retirement villages with the relevant amount being used to calculate the low value.

The above table does not take into account future operating costs, future Receivers fees and future rates and land tax. It also excludes any legal recoveries against borrowers, valuers or other third parties.

Please note that the distribution to Investors will take place after paying secured creditors, land tax, rates, Receivers fees and the unsecured creditors who rank ahead of Investors' interests.

6. Updated Unit Price

The unit price will be updated twice per year as at 30 June and 31 December. In this regard, I provide below an updated unit price as at 31 December 2014 of 16 cents, which is based on the mid-point of the high and low estimated selling prices of the secured assets as at 31 December 2014.

| | \$000's |
|---|----------------|
| Total Value of Fund Assets as at 31 December 2014 (net of land tax and rates) | 89,776 |
| Less Creditors and Other Payables | (13,690) |
| Total Net Value of Fund Assets | 76,086 |
| Total Number of Units as at 31 December 2014 | 478,274 |
| Unit Price | 0.16 |

I *attach* a copy of a letter that may be forwarded to Centrelink confirming the unit price as at 31 December 2014, and which may be used by investors to assist with the review of their pensions.

7. Distributions to Investors

As previously advised, I am on notice from KordaMentha that the MPF potentially have a breach of trust claim against the Fund. In addition, the Receivers and Managers who were appointed to Bellpac have put me on notice not to distribute funds until the proceedings mentioned at section 3.2.2 above are resolved and also due to the MPF position, the secured creditor has not yet released its charge or retired its Receivers.

Once the Receivers and Managers have retired and funds released to me, I will be required to retain certain funds to meet the liabilities of the Fund, including contingent claims that may arise from the Bellpac litigation, the funds received for the loan/lease agreements of the aged care facilities (which totals approximately \$12 million) and potentially in relation to the KordaMentha claims.

I may have to seek the directions of the Court before proceeding with the next distribution.

I will update investors as to the expected timing of a distribution as these matters become clearer.



8. Fees claimed by LM Investment Management Ltd (In Liquidation) ("LMIM") (by its liquidators, FTI Consulting)

The liquidators of LMIM, Mr Park and Ms Muller, have submitted invoices from LMIM, made out to the Fund, totalling \$3,265,742 excluding GST for payment in relation to their remuneration and out of pocket expenses for the period from 19 March 2013 to 30 June 2014.

The claim can be broken down into the following three categories:

- Category 1 relates to time spent working on specific fund matters;
- Category 2 is in respect of LMIM's role as the Responsible Entity of the Fund with the time spent by the liquidators and their staff being allocated across all Funds under their control based on a percentage of funds under management;
- Category 3 in relation to the appointments of LMIM as Controllers of a number of assets and where they are acting as agent for the mortgagee in possession.

| | Paid to date (GST exclusive) \$ | Outstanding (GST exclusive) \$ |
|---|---------------------------------------|--------------------------------------|
| Direct time charged to work undertaken for the Fund - including outlays (category 1) | | 1,742,674 |
| Allocation of Responsible Entity time (category 2) | | 1,174,678 |
| Time charged in respect of the Controllerships (category 3) (19 March 2013 to 31 December 2013) | 181,112 | |
| Time charged in respect of the Controllerships (category 3) (1 January 2014 to 24 September 2014) | | 62,505 |
| Operational and loan recovery costs | | 285,885 |
| | 181,112 | 3,265,742 |

As previously advised, both McGrathNicol and I have raised legal questions as to whether certain work done by the liquidators of LMIM can properly be charged to the Fund, as well as questions as to the quantum claimed. As a result of these issues, I have met with FTI to discuss certain aspects of their claim and we are currently in the process of agreeing a framework for determining their claim. It is proposed that directions are sought from the Court as to their entitlement to claim under various categories and that their claim be reviewed and adjudicated on by an independent expert.

Prior to the application being made to the court for directions, FTI have advised that they would wish the court to clarify any ongoing role the responsible entity may have and the residual powers they may have as a result of my appointment. This application is presently being prepared by FTI's solicitors.

9. Management Accounts

The management accounts for the year ending 30 June 2014 are now available on the website www.lmfimf.com.



I am currently preparing the management accounts for the half year ending 31 December 2014. These accounts will be prepared in accordance with the relevant accounting standards and will be posted on the website www.lmfimf.com when finalised.

10. Western Union

It has been brought to my attention that a number of the payments in respect of capital distributions to overseas investors in March 2013 were retained by Western Union and not forwarded to the intended recipients.

I am currently in discussions with Western Union regarding the release of these monies.

11. Ongoing Reporting to Investors

Reports will be distributed to investors in accordance with the preferred method of correspondence recorded for each investor on the Fund's database. In order to assist in reducing distribution costs, it would be appreciated if as many investors as possible could provide an email address in this respect. Please use the details in section 12 below to advise us in this regard.

My next report to investors will be issued by 30 April 2015.

12. Receiver's Remuneration and Expenses

As previously advised, an application was made to Court on 7 November 2014 for approval of my remuneration for the period from 1 April 2014 to 30 September 2014. The hearing in this respect took place on 27 November 2014. The court approved the remuneration sought of \$1,005,948.35 (inclusive of GST) in respect of work undertaken in dealing with FMIF during the period from 1 April 2014 to 30 September 2014. In addition, the court approved the remuneration sought of \$7,000.95 in respect of the work undertaken on the six controllerships relating to the retirement villages during the period from 25 September 2014 to 30 September 2014.

In addition to the remuneration for the above court application, I have incurred further remuneration of \$926,767.50 plus outlays of \$11,001.23 plus GST for the period from 1 October 2014 to 23 January 2015 including work undertaken in respect of the controllerships for the retirement village assets of \$157,212.50 as detailed in the table below and attached summaries.

| | Remuneration (GST exclusive) \$ | Outlays (GST exclusive) \$ |
|---|--|-------------------------------------|
| LM First Mortgage Income Fund (Receivers & Managers Appointed) (Receiver Appointed) | 769,555.00 | 7,231.97 |
| OVST Pty Ltd (In Liquidation) (Controllers Appointed) | 35,495.50 | 827.63 |
| Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) | 35,069.50 | 1,467.93 |
| Bridgewater Lake Estate Ltd (In Liquidation) (Controllers Appointed) | 26,039.00 | 22.84 |
| Redland Bay Leisure Life Ltd (In Liquidation) (Controllers Appointed) | 31,981.50 | 1,428.02 |
| Redland Bay Leisure Life Development Ltd (In Liquidation) (Controllers Appointed) | 3,698.50 | 0.56 |
| Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers & Managers Appointed) (Controllers Appointed) | 24,928.50 | 22.28 |
| | 926,767.50 | 11,001.23 |

I will apply to the Court for approval of this remuneration in due course and will advise investors accordingly.

13. Queries

Should unit holders wish to advise of any changes in details or require further information, please contact BDO as follows:

BDO, GPO Box 457, Brisbane QLD 4001

Phone: +61 7 3237 5999

Fax: +61 7 3221 9227

Email: enquiries@lmfmif.com

Yours sincerely



David Whyte
Receiver

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
 LM First Mortgage Income Fund (Receivers and Managers Appointed) (Receiver Appointed)

| Employee | Position | Totals | | Assets | | Creditors | | Task Area | | Investigations | | Administration | | | |
|-----------------------|----------------|--------|------------|--------|-----------|-----------|-----------|-----------|--------|----------------|-----------|----------------|-----------|------|-----------|
| | | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | | |
| Angie Hicks | Partner | 1.0 | 600.00 | 1.0 | 600.00 | 6.4 | 3,584.00 | 0.2 | 112.00 | 80.2 | 44,912.00 | 13.3 | 7,448.00 | 37.1 | 20,776.00 |
| David Whyte | Partner | 214.6 | 120,176.00 | 77.4 | 43,344.00 | | | | | | | | | 1.3 | 728.00 |
| Andrew Fielding | Partner | 1.3 | 728.00 | | | | | | | | | | | | |
| Steven Sorbello | Partner | 0.8 | 436.00 | 0.8 | 436.00 | | | | | | | | | | |
| Eric Leeuwendal | Director | 314.1 | 155,479.50 | 64.9 | 32,125.50 | 10.7 | 5,296.50 | | | 2.6 | 1,287.00 | 148.5 | 73,507.50 | 87.4 | 43,263.00 |
| Craig Jenkins | Partner | 4.0 | 1,940.00 | 4.0 | 1,940.00 | | | | | | | | | | |
| Sharrle Mitchell | Senior Manager | 0.7 | 332.50 | 0.7 | 332.50 | | | | | | | | | | |
| Margaux Beauchamp | Associate | 207.8 | 97,290.00 | 207.0 | 97,290.00 | | | | | | | | | | |
| John Somerville | Senior Manager | 146.7 | 64,548.00 | 91.0 | 40,040.00 | 0.7 | 308.00 | | | 37.7 | 16,588.00 | | | 17.3 | 7,612.00 |
| Charles Haines | Senior Manager | 1.8 | 792.00 | | | | | | | | | | | 1.8 | 792.00 |
| Joanne Garcia | Manager | 382.6 | 153,040.00 | 26.9 | 10,760.00 | 35.3 | 14,120.00 | 0.1 | 40.00 | 246.3 | 98,520.00 | 3.6 | 1,440.00 | 70.4 | 28,160.00 |
| Michelle Matchett | Associate | 20.7 | 8,073.00 | 20.7 | 8,073.00 | | | | | | | | | | |
| Julie Pagcu | Senior Manager | 3.0 | 1,095.00 | 3.0 | 1,095.00 | | | | | | | | | | |
| Ashleigh Simpson-Wade | Supervisor | 0.4 | 144.00 | | | | | | | | | | | 0.2 | 72.00 |
| Daniel Tipman | Supervisor | 30.2 | 10,872.00 | 0.6 | 216.00 | 14.5 | 5,220.00 | 0.2 | 72.00 | 15.1 | 5,436.00 | | | | |
| Julie Pagcu | Senior Manager | 46.5 | 16,740.00 | 46.5 | 16,740.00 | | | | | | | | | | |
| Michael Dharmaratne | Supervisor | 0.1 | 36.00 | | | 0.1 | 36.00 | | | | | | | | |
| Michael Dharmaratne | Supervisor | 9.0 | 2,880.00 | 0.3 | 96.00 | 6.5 | 2,080.00 | | | | | | | 2.2 | 704.00 |
| Daniel Tipman | Supervisor | 54.5 | 17,440.00 | 1.5 | 480.00 | 32.2 | 10,304.00 | | | 10.1 | 3,232.00 | 0.3 | 96.00 | 10.4 | 3,328.00 |

| Employee | Position | Rate | Totals | | Assets | | Creditors | | Employees | | Trade On | | Investigations | | Administration | |
|------------------|----------------------|------|--------------------------|---------------|--------|------------|-----------|-----------|-----------|--------|----------|------------|----------------|-----------|----------------|------------|
| | | | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ |
| Naami Rowsome | Supervisor | 310 | 2.5 | 775.00 | 2.5 | 775.00 | 12.8 | 2,880.00 | 2.0 | 450.00 | 6.8 | 1,530.00 | 0.8 | 180.00 | 28.9 | 6,502.50 |
| Mia Russo | Supervisor | 280 | 0.8 | 224.00 | 0.8 | 224.00 | | | | | | | | | | |
| Nicola Kennedy | Accountant I | 225 | 52.9 | 11,902.50 | 1.6 | 360.00 | | | | | | | | | | |
| Rycko Tamiran | Senior Accountant II | 200 | 46.1 | 9,220.00 | 46.1 | 9,220.00 | | | | | | | | | | |
| Pei Wun Han | Accountant I | 200 | 1.1 | 220.00 | 1.1 | 220.00 | | | | | | | | | | |
| Dermot O'Brien | Account II | 195 | 112.0 | 21,840.00 | 0.8 | 156.00 | 1.4 | 273.00 | | | 2.0 | 390.00 | | | 107.8 | 21,021.00 |
| Sarah Cunningham | Team Assistant | 195 | 3.0 | 585.00 | 0.4 | 78.00 | | | | | 2.6 | 507.00 | | | | |
| Pei Wun Han | Accountant I | 185 | 156.4 | 28,934.00 | 156.4 | 28,934.00 | | | | | | | | | | |
| Dale Ludwig | Accountant I | 185 | 227.5 | 42,087.50 | 227.5 | 42,087.50 | | | | | | | | | | |
| Owen Lomergan | Accountant I | 185 | 0.8 | 148.00 | 0.8 | 148.00 | | | | | | | | | | |
| Nicole Jackson | Team Assistant | 155 | 1.2 | 186.00 | | | 1.2 | 186.00 | | | | | | | | |
| Bodie Smith | Accountant II | 145 | 1.6 | 232.00 | 1.6 | 232.00 | | | | | | | | | | |
| Sharon Aranha | Secretary | 130 | 1.9 | 247.00 | 1.9 | 247.00 | | | | | | | | | | |
| Maira Hattigh | Team Assistant | 80 | 3.9 | 312.00 | | | | | | | | | | | 3.9 | 312.00 |
| TOTALS: | | | 2,051.5 | 769,555.00 | 987.8 | 336,249.50 | 121.8 | 44,287.50 | 2.5 | 674.00 | 403.4 | 172,402.00 | 166.5 | 82,671.50 | 368.7 | 133,270.50 |
| | | | | GST 76,955.50 | | | | | | | | | | | | |
| | | | TOTAL INC GST 846,510.50 | | | | | | | | | | | | | |
| | | | AVERAGE HOURLY RATE 375 | | 340 | | 364 | | 270 | | 427 | | 497 | | 361 | |

Note: All amounts exclude GST unless otherwise noted

**Disbursements for the period 1
October 2014 to 23 January
2015**

**LM First Mortgage Income
Fund (Receivers and Managers
Appointed) (Receiver
Appointed)**

| Expense Type | Amount (\$ ex GST) |
|----------------------|-------------------------------|
| Photocopy | 105.60 |
| Parking | 358.64 |
| Search Fee | 176.10 |
| Mileage | 866.80 |
| Postage | 5,724.83 |
| TOTAL | 7,231.97 |
| GST | 723.20 |
| TOTAL INC GST | 7,955.17 |

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
 OVST Pty Ltd (In Liquidation) (Controllers Appointed)

| Employee | Position | Rate | Totals | | Task Area | | | | | | | | | | | |
|-----------------------|----------------|------|---------------------|-----------|-----------|-----------|-----------|----------|----------------|----------------|------|-----------|------|----------|------|----------|
| | | | hrs | \$ | Assets | Creditors | Employees | Trade On | Investigations | Administration | | | | | | |
| David Whyte | Partner | 560 | 12.1 | 6,776.00 | 8.0 | 4,480.00 | 0.2 | 112.00 | 3.8 | 2,128.00 | 0.1 | 56.00 | 0.6 | 264.00 | | |
| John Somerville | Senior Manager | 440 | 28.2 | 12,408.00 | 24.0 | 10,560.00 | | | 3.3 | 1,452.00 | | | 0.8 | 320.00 | | |
| Joanne Garcia | Manager | 400 | 10.2 | 4,080.00 | 0.8 | 320.00 | | | 8.6 | 3,440.00 | 0.1 | 36.00 | 0.1 | 36.00 | | |
| Ashleigh Simpson-Wade | Supervisor | 360 | 0.2 | 72.00 | | | | | 0.3 | 108.00 | | | 0.1 | 36.00 | | |
| Daniel Tipman | Supervisor | 360 | 0.4 | 144.00 | | | | | 2.1 | 672.00 | | | 0.3 | 96.00 | | |
| Daniel Tipman | Supervisor | 320 | 6.3 | 2,016.00 | 2.8 | 896.00 | 0.4 | 128.00 | 6.7 | 1,507.50 | | | 8.4 | 1,890.00 | | |
| Nicola Kennedy | Accountant I | 225 | 20.3 | 4,567.50 | 2.5 | 562.50 | 2.5 | 562.50 | 16.0 | 3,120.00 | | | 0.6 | 117.00 | | |
| Sarah Cunningham | Team Assistant | 195 | 16.6 | 3,237.00 | | | | | | | | | 10.6 | 2,067.00 | | |
| Dermot O'Brien | Undergraduate | 195 | 10.6 | 2,067.00 | | | | | | | | | 1.6 | 128.00 | | |
| Maira Hattingh | Team Assistant | 80 | 1.6 | 128.00 | | | | | | | | | | | | |
| TOTALS | | | 106.5 | 35,495.50 | 38.1 | 16,818.50 | 1.2 | 401.00 | 3.1 | 802.50 | 40.8 | 12,427.50 | 0.2 | 92.00 | 23.1 | 4,954.00 |
| | | | GST | 3,549.55 | | | | | | | | | | | | |
| | | | TOTAL INC GST | 39,045.05 | | | | | | | | | | | | |
| | | | AVERAGE HOURLY RATE | 333 | 441 | 334 | 259 | 305 | 460 | 214 | | | | | | |

Note: All amounts exclude GST unless otherwise noted

| Disbursements for the period 1 October 2014 to 23 January 2015 | |
|---|-----------------------|
| OVST Pty Ltd (In Liquidation) (Controllers Appointed) | |
| Expense Type | Amount (\$ ex GST) |
| Search Fee | 825.95 |
| Postage | 1.68 |
| TOTAL | 827.63 |
| GST | 82.76 |
| TOTAL INC GS* | 910.39 |

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 22 January 2015
Redland Bay Leisure Life Development Pty Ltd (In Liquidation) (Controllers Appointed)

| Employee | Position | Rate | Totals | | Assets | | Creditors | | Task Area | | Trade On | | Administration | |
|-----------------------|----------------|------|----------------------------|-----------------|------------|---------------|------------|---------------|------------|---------------|------------|---------------|----------------|-----------------|
| | | | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ |
| David Whyte | Partner | 560 | 0.2 | 112.00 | 0.1 | 56.00 | | | | | 0.1 | 56.00 | 0.8 | 320.00 |
| Joanne Garcia | Manager | 400 | 0.8 | 320.00 | | | | | | | | | 0.1 | 36.00 |
| Ashleigh Simpson-Wade | Supervisor | 360 | 0.1 | 36.00 | | | | | | | | | | 544.00 |
| Daniel Tipman | Supervisor | 320 | 3.8 | 1,216.00 | 1.0 | 320.00 | 0.5 | 160.00 | | | 0.6 | 192.00 | 1.7 | 720.00 |
| Nicola Kennedy | Accountant I | 225 | 3.8 | 855.00 | | | | | 0.8 | 156.00 | 0.6 | 135.00 | 3.2 | 897.00 |
| Dermot O'Brien | Undergraduate | 195 | 5.4 | 1,053.00 | | | | | | | 0.2 | 39.00 | 4.6 | 897.00 |
| Sarah Cunningham | Team Assistant | 195 | 0.3 | 58.50 | | | | | | | | | 0.1 | 19.50 |
| Moiria Hattingh | Team Assistant | 80 | 0.6 | 48.00 | | | | | | | | | 0.6 | 48.00 |
| TOTALS | | | 15.0 | 3,698.50 | 1.1 | 376.00 | 0.5 | 160.00 | 0.8 | 156.00 | 1.5 | 422.00 | 11.1 | 2,584.50 |
| | | | GST | 369.85 | | | | | | | | | | |
| | | | TOTAL INC GST | 4,068.35 | | | | | | | | | | |
| | | | AVERAGE HOURLY RATE | 247 | 342 | 320 | 195 | 281 | 233 | | | | | |

Note: All amounts exclude GST unless otherwise noted

**Disbursements for the period 1 October 2014
to 22 January 2015**

**Redland Bay Leisure Life Development Pty
Ltd (In Liquidation) (Controllers Appointed)**

| Expense Type | Amount (\$ ex GST) |
|----------------------|-----------------------|
| Postage | 0.56 |
| TOTAL | 0.56 |
| GST | 0.06 |
| TOTAL INC GS' | 0.62 |

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed)

| Employee | Position | Rate | Totals | | Task Area | | | | | | | |
|------------------|----------------|------|-------------|--------------------------------|-------------|------------------|------------|----------------|-------------|-----------------|-------------|-----------------|
| | | | hrs | \$ | Assets | Creditors | Trade On | Administration | hrs | \$ | hrs | \$ |
| David Whyte | Partner | 560 | 8.7 | 4,872.00 | 6.7 | 3,752.00 | | 1.6 | 896.00 | 0.4 | 224.00 | |
| John Somerville | Senior Manager | 440 | 20.0 | 8,800.00 | 16.8 | 7,392.00 | | 3.0 | 1,320.00 | 0.2 | 88.00 | |
| Joanne Garcia | Manager | 400 | 4.9 | 1,960.00 | 0.5 | 200.00 | | 3.5 | 1,400.00 | 0.9 | 360.00 | |
| Daniel Tipman | Supervisor | 360 | 1.1 | 396.00 | 0.5 | 180.00 | 0.4 | 144.00 | | 0.2 | 72.00 | |
| Daniel Tipman | Supervisor | 320 | 9.9 | 3,168.00 | 3.5 | 1,120.00 | 1.0 | 320.00 | 2.4 | 768.00 | 3.0 | 960.00 |
| Nicola Kennedy | Accountant I | 225 | 12.0 | 2,700.00 | 1.1 | 247.50 | | 2.1 | 472.50 | 8.8 | 1,980.00 | |
| Sarah Cunningham | Team Assistant | 195 | 13.7 | 2,671.50 | | | | 13.0 | 2,535.00 | 0.7 | 136.50 | |
| Dermot O'Brien | Undergraduate | 195 | 1.4 | 273.00 | | | | | | 1.4 | 273.00 | |
| Moira Hattingh | Team Assistant | 80 | 1.1 | 88.00 | 0.2 | 16.00 | | | | 0.9 | 72.00 | |
| TOTALS | | | 72.8 | 24,928.50 | 29.3 | 12,907.50 | 1.4 | 464.00 | 25.6 | 7,391.50 | 16.5 | 4,165.50 |
| | | | | GST 2,492.85 | | | | | | | | |
| | | | | TOTAL INC GST 27,421.35 | | | | | | | | |
| | | | | AVERAGE HOURLY RATE 342 | | 441 | | 331 | | 289 | | 252 |

Note: All amounts exclude GST unless otherwise noted

| Disbursements for the period 1 October 2014 to 23 January 2015 Cameo Estates Lifestyle Villages (Launceston) Pty Ltd (Receivers and Managers Appointed) (Controllers Appointed) | | Amount (\$ ex GST) |
|--|--|-------------------------------|
| Expense Type | | |
| Search Fee | | 20.60 |
| Postage | | 1.68 |
| TOTAL | | 22.28 |
| GST | | 2.23 |
| TOTAL INC GST | | 24.51 |

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
Bridgewater Lake Estate Pty Limited (In Liquidation) (Controllers Appointed)

| Employee | Position | Rate | Totals | | Assets | | Creditors | | Task Area | | Trade On | | Administration | |
|------------------|----------------|------|----------------------------|------------------|-------------|------------------|------------|---------------|------------|--------------|-------------|------------------|----------------|-----------------|
| | | | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ |
| David Whyte | Partner | 560 | 11.1 | 6,216.00 | 8.6 | 4,816.00 | 0.6 | 336.00 | | | 1.9 | 1,064.00 | | |
| John Somerville | Senior Manager | 440 | 17.4 | 7,656.00 | 15.2 | 6,688.00 | 0.3 | 132.00 | | | 1.6 | 704.00 | 0.3 | 132.00 |
| Joanne Garcia | Manager | 400 | 9.0 | 3,600.00 | 0.2 | 80.00 | | | | | 7.7 | 3,080.00 | 1.1 | 440.00 |
| Chris Demeyere | Supervisor | 360 | 0.3 | 108.00 | | | | | | | 0.3 | 108.00 | | |
| Daniel Tipman | Supervisor | 360 | 0.3 | 108.00 | | | | | | | 0.3 | 108.00 | | |
| Daniel Tipman | Supervisor | 320 | 5.5 | 1,760.00 | 0.6 | 192.00 | 1.6 | 512.00 | | | 3.3 | 1,056.00 | | |
| Nicola Kennedy | Accountant I | 225 | 9.8 | 2,205.00 | 1.8 | 405.00 | | | 0.1 | 22.50 | 3.2 | 720.00 | 4.7 | 1,057.50 |
| Sarah Cunningham | Team Assistant | 195 | 19.0 | 3,705.00 | | | | | | | 17.7 | 3,451.50 | 1.3 | 253.50 |
| Dermot O'Brien | Undergraduate | 195 | 3.0 | 585.00 | | | | | | | | | 3.0 | 585.00 |
| Moirra Hattingh | Team Assistant | 80 | 1.2 | 96.00 | | | | | | | | | 1.2 | 96.00 |
| TOTALS | | | 76.6 | 26,039.00 | 26.4 | 12,181.00 | 2.5 | 980.00 | 0.1 | 22.50 | 36.0 | 10,291.50 | 11.6 | 2,564.00 |
| | | | GST | 2,603.90 | | | | | | | | | | |
| | | | TOTAL INC GST | 28,642.90 | | | | | | | | | | |
| | | | AVERAGE HOURLY RATE | 340 | 461 | 392 | 225 | 286 | 221 | | | | | |

Note: All amounts exclude GST unless otherwise noted

**Disbursements for the period 1 October 2014
to 23 January 2015
Bridgewater Lake Estate Pty Limited (In
Liquidation) (Controllers Appointed)**

| Expense Type | Amount (\$ ex GST) |
|----------------------|-------------------------------|
| Postage | 2.24 |
| Search Fee | 20.60 |
| TOTAL | 22.84 |
| GST | 2.28 |
| TOTAL INC GST | 25.12 |

REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed)

| Employee | Position | Rate | Totals | | Assets | | Creditors | | Task Area | | Trade On | | Administration | |
|----------------------|----------------|------|--------------|--------------------------------|-------------|------------------|------------|---------------|------------|---------------|-------------|------------------|----------------|-----------------|
| | | | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ | hrs | \$ |
| David Whyte | Partner | 560 | 14.1 | 7,896.00 | 8.5 | 4,760.00 | 0.2 | 112.00 | 0.1 | 56.00 | 5.3 | 2,968.00 | | |
| John Somerville | Senior Manager | 440 | 26.7 | 11,748.00 | 23.6 | 10,384.00 | 0.4 | 176.00 | | | 2.7 | 1,188.00 | | |
| Joanne Garcia | Manager | 400 | 11.4 | 4,560.00 | 0.8 | 320.00 | | | | | 9.5 | 3,800.00 | 1.1 | 440.00 |
| Asleigh Simpson-Wade | Supervisor | 360 | 0.1 | 36.00 | | | | | | | | | 0.1 | 36.00 |
| Daniel Tipman | Supervisor | 360 | 0.1 | 36.00 | | | | | | | | | | |
| Daniel Tipman | Supervisor | 320 | 6.1 | 1,952.00 | 4.8 | 1,536.00 | | | | | 0.2 | 64.00 | 1.1 | 352.00 |
| Nicola Kennedy | Accountant I | 225 | 20.2 | 4,545.00 | 2.4 | 540.00 | | | 0.9 | 202.50 | 7.0 | 1,575.00 | 9.9 | 2,227.50 |
| Sarah Cunningham | Team Assistant | 195 | 16.2 | 3,159.00 | | | | | | | 15.3 | 2,983.50 | 0.9 | 175.50 |
| Dermot O'Brien | Undergraduate | 195 | 5.3 | 1,033.50 | | | | | | | | | 5.3 | 1,033.50 |
| Moira Hattingh | Team Assistant | 80 | 1.3 | 104.00 | | | | | | | | | 1.3 | 104.00 |
| TOTALS | | | 101.5 | 35,069.50 | 40.1 | 17,540.00 | 0.7 | 324.00 | 1.0 | 258.50 | 40.0 | 12,578.50 | 19.7 | 4,368.50 |
| | | | | GST 3,506.95 | | | | | | | | | | |
| | | | | TOTAL INC GST 38,576.45 | | | | | | | | | | |
| | | | | AVERAGE HOURLY RATE 346 | 437 | 463 | 259 | 314 | 222 | | | | | |

Note: All amounts exclude GST unless otherwise noted

| Disbursements for the period 1 October 2014 to 23 January 2015 | |
|--|-------------------------------|
| Pinevale Villas Morayfield Pty Ltd (In Liquidation) (Controllers Appointed) | |
| Expense Type | Amount (\$ ex GST) |
| Search Fee | 1,466.25 |
| Postage | 1.68 |
| TOTAL | 1,467.93 |
| GST | 146.79 |
| TOTAL INC GS* | 1,614.72 |

**REMUNERATION REPORT - Summary of professional fees by category of work for the period 1 October 2014 to 23 January 2015
Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed)**

| Employee | Position | Rate | Totals | | Assets | Creditors | | Task Area | | Trade On | Administration | | | |
|-----------------------|----------------|------|----------------------------|------------------|-------------|------------------|------------|---------------|------------|---------------|----------------|------------------|-------------|-----------------|
| | | | hrs | \$ | | hrs | \$ | hrs | \$ | | | hrs | \$ | |
| David Whyte | Partner | 560 | 20.2 | 11,312.00 | 16.0 | 8,960.00 | | | | 3.9 | 2,184.00 | 0.3 | 168.00 | |
| Andrew Fielding | Partner | 560 | 0.1 | 56.00 | | | | | | | | 0.1 | 56.00 | |
| John Somerville | Senior Manager | 440 | 22.5 | 9,900.00 | 19.7 | 8,668.00 | 0.4 | 176.00 | | 2.4 | 1,056.00 | | | |
| Joanne Garcia | Manager | 400 | 9.1 | 3,640.00 | 1.3 | 520.00 | | | | 7.0 | 2,800.00 | 0.8 | 320.00 | |
| Ashleigh Simpson-Wade | Supervisor | 360 | 0.1 | 36.00 | | | | | | | | 0.1 | 36.00 | |
| Nicola Kennedy | Accountant I | 225 | 15.7 | 3,532.50 | 3.3 | 742.50 | | | 0.8 | 5.7 | 1,282.50 | 5.9 | 1,327.50 | |
| Sarah Cunningham | Team Assistant | 195 | 15.8 | 3,081.00 | | | | | | 15.2 | 2,964.00 | 0.6 | 117.00 | |
| Dermot O'Brien | Undergraduate | 195 | 1.6 | 312.00 | | | | | | | | 1.6 | 312.00 | |
| Maira Hattingh | Team Assistant | 80 | 1.4 | 112.00 | | | | | | | | 1.4 | 112.00 | |
| TOTALS | | | 86.5 | 31,981.50 | 40.3 | 18,890.50 | 0.4 | 176.00 | 0.8 | 180.00 | 34.2 | 10,286.50 | 10.8 | 2,448.50 |
| | | | GST | 3,198.15 | | | | | | | | | | |
| | | | TOTAL INC GST | 35,179.65 | | | | | | | | | | |
| | | | AVERAGE HOURLY RATE | 370 | 469 | 440 | 225 | 301 | 227 | | | | | |

Note: All amounts exclude GST unless otherwise noted

| Disbursements for the period 1 October 2014 to 23 January 2015 | |
|--|-------------------------------|
| Redland Bay Leisure Life Pty Ltd (In Liquidation) (Controllers Appointed) | |
| Expense Type | Amount (\$ ex GST) |
| Search Fee | 1,426.90 |
| Postage | 1.12 |
| TOTAL | 1,428.02 |
| GST | 142.80 |
| TOTAL INC GST | 1,570.82 |



Tel: +61 7 3237 5999
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Level 10, 12 Creek St
Brisbane QLD 4000
GPO Box 457 Brisbane QLD 4001
AUSTRALIA

TO WHOM IT MAY CONCERN

30 January 2015

LM FIRST MORTGAGE INCOME FUND (RECEIVERS AND MANAGERS APPOINTED) (RECEIVER APPOINTED) ARSN 089 343 288 ('the Fund' or 'FMIF')

I refer to my appointment as the Receiver of the Fund's assets and the person responsible for ensuring the winding up of the Fund in accordance with the terms of its constitution by Order of the Supreme Court of Queensland on 8 August 2013.

I provide an update on the estimated unit price of the fund as at 31 December 2014, calculated as follows:

| | \$000's |
|---|----------------|
| Total Value of Fund Assets as at 31 December 2014 (net of land tax and rates) | 89,776 |
| Less Creditors and Other Payables | (13,690) |
| Total Net Value of Fund Assets | 76,086 |
| Total Number of Units as at 31 December 2014 | 478,274 |
| Unit Price | 0.16 |

Should you have any queries in respect of the above, please contact Nicola Kennedy of my office on (07) 3237 5785.

Yours faithfully,


David Whyte
Receiver



Current details for ABN 66 482 247 488

ABN details

Entity name: THE TRUSTEE FOR LM FIRST MORTGAGE INCOME FUND

ABN status: Active from 01 Nov 1999

Entity type: Unlisted Public Unit Trust

Goods & Services Tax (GST): Registered from 01 Jul 2000

Main business location: QLD 4217

Deductible gift recipient status

Not entitled to receive tax deductible gifts

ABN last updated: 30 Jun 2010

Record extracted: 03 Feb 2015

Disclaimer

The Registrar of the ABR monitors the quality of the information available on this website and updates the information regularly. However, neither the Registrar of the ABR nor the Commonwealth guarantee that the information available through this service (including search results) is accurate, up to date, complete or accept any liability arising from the use of or reliance upon this site.

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 12317/14

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

AND

First Defendant : **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

CLAIM

The plaintiff claims:

1. As against each of the first, second, third, fourth, fifth, sixth and seventh defendants:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that each defendant pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;



BNEDOC5 13782357_1.doc

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SCZ:ISO:201401822

- (b) Interest under s 5B of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
2. As against the seventh and eighth defendants a declaration that:
- (a) The seventh defendant is entitled to be indemnified out of the assets of the LM Managed Performance Fund in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (b) The seventh defendant has a lien or charge over the assets and undertakings of the LM Managed Performance Fund in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (c) The plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the LM Managed Performance Fund.
3. Such further or other orders as this Court deems fit.

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 19 December 2014:

Registrar:



To the defendants:

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.

If you object that these proceedings have not been commenced in the correct district of the Court, that objection must be included in your Notice of Intention to Defend.

PARTICULARS OF THE PLAINTIFF:

Name: LM INVESTMENT MANAGEMENT LIMITED (RECEIVERS & 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/- David Whyte, BDO
Level 10
12 Creek Street
BRISBANE QLD 4000

**Plaintiff's solicitors name:
and firm name:**

**Scott Couper
Gadens Lawyers**

Solicitor's business address:

**Level 11
111 Eagle Street
BRISBANE QLD 4000**

Address for service:

**Level 11
111 Eagle Street
BRISBANE QLD 4000**

**Telephone: 07 3231 1666
Fax: 07 3229 5850**

Signed:

Gadens

Description:

Solicitor for the plaintiff

Dated:

19 December 2014

Claim is to be served on:

**The First Defendant, Second Defendant, Third Defendant,
Fourth Defendant, Fifth Defendnat, Sixth Defendant, Seventh
Defendant and Eighth Defendants**

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER:

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES OF THE LM MANAGED PERFORMANCE FUND**

STATEMENT OF CLAIM

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

Parties and roles

1. The seventh defendant, LM Investment Management Limited (Receivers and Managers Appointed) (In Liquidation) ACN 077 208 461 (LMIM):

Statement of claim
Filed on behalf of the Plaintiff
Form 16 Rules 22, 146

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
SCZ:JSO:201401822

- (a) is and was at all material times a company duly incorporated and capable of suing in its own name;
 - (b) is and was at all material times the Responsible Entity (RE) of the LM First Mortgage Income Fund ARSN 089 343 288 (FMIF);
 - (c) was, until order of this Honourable Court on 12 April 2013 (LM Order), trustee of the trust named The LM Managed Performance Fund (MPF);
 - (d) was placed into voluntary administration on 19 March 2013 and John Park and Ginette Muller of FTI Consulting were appointed voluntary administrators;
 - (e) had receivers and managers, Joseph Hayes and Anthony Connelly of McGrathNicol, appointed to certain of its property held in its capacity as RE of FMIF on 11 July 2013 by Deutsche Bank AG (Deutsche);
 - (f) was placed into liquidation on 1 August 2013 following a resolution of its creditors that it be placed into liquidation and that John Park and Ginette Muller be appointed liquidators (Liquidators).
2. At all material times each of the first to sixth defendants was a director of LMIM.
3. By Order of this Honourable Court dated 21 August 2013 (FMIF Order), David Whyte (Receiver), Partner of BDO Business Recovery & Insolvency (Qld) Pty Ltd:
- (a) was appointed to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution (Appointment);
 - (b) was appointed as receiver of the property of the FMIF;
 - (c) has, in relation to the property of FMIF for which he is appointed receiver, the powers set out in s 420 of the *Corporations Act 2001* (Cth) (Act); and
 - (d) without derogating in any way from the Appointment or the Receiver's powers pursuant to the FMIF Order, was authorised to, inter alia:
 - (i) take all steps necessary to ensure the realisation of property of FMIF held by LMIM as RE of the FMIF by exercising any legal right of LMIM as RE of the FMIF in relation to the property including but not limited to:
 - (A) providing instructions to solicitors, valuers, estate agents or other consultants as are necessary to negotiate or finalise the sale of the property;
 - (B) providing a response as appropriate to matters raised by receivers of property of LMIM as RE of the FMIF to which receivers have been appointed;
 - (C) 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 the property;
 - (D) appointing receivers, entering into possession as mortgagee or exercising any power of sale; and
 - (E) executing contracts, transfers or releases or any such other documents as are required to carry out any of the above;
 - (ii) 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, including the execution of 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;

(e) is entitled to bring and does bring these proceedings in the name of LMIM as RE of the FMIF.

4. Further, by the LM Order, LMIM was removed as trustee of the MPF and the Eighth Defendants, Korda Mentha Pty Ltd ACN 100 169 391 and Calibre Capital Pty Ltd ABN 66 108 318 985, were appointed joint and several trustees of the MPF.

Belpac loans

5. On or about 10 March 2003, Permanent Trustee Australia Limited as custodian of LMIM as RE of the FMIF (PTAL) entered into a loan agreement with Belpac (FMIF Belpac Loan Agreement).
6. Pursuant to the FMIF Belpac Loan Agreement, PTAL agreed to advance and did advance the sum of \$16M to Belpac (FMIF Belpac Loan).
7. As security for the FMIF Belpac Loan, Belpac granted to:
- (a) a first registered mortgage (PTAL Mortgage) over land known as "Balgownie No 1 Colliery Wollongong" in the state of New South Wales (Property); and
 - (b) a registered charge over Belpac (PTAL Charge).
8. Between December 2003 and July 2008, the FMIF Belpac Loan Agreement was varied.
9. On or about 23 June 2006 LMIM as trustee for the MPF entered into a loan agreement with Belpac (MPF Belpac Loan Agreement).
10. Pursuant to the MPF Belpac Loan Agreement, LMIM as trustee for the MPF agreed to advance and did advance the sum of \$6M to Belpac (MPF Belpac Loan).
11. As security for the MPF Belpac Loan, Belpac granted to LMIM as trustee for the MPF:
- (a) a registered mortgage over the Property (which was registered as the third registered mortgage) (MPF Mortgage); and
 - (b) a registered charge over Belpac (MPF Charge).
12. On or about 23 June 2006 LMIM as RE of the FMIF, LMIM as trustee for the MPF, GPC No. 11 Pty Ltd, GPC No. 12 Pty Ltd, GPC No. 8 (Bull) Pty Ltd, Austcorp Project No. 20 Pty Ltd and Belpac entered into a Deed of Priority (Deed of Priority) pursuant to which:
- (a) LMIM as RE for the FMIF was granted first priority to the extent of the Principal Amount of \$33.8M plus interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
 - (b) LMIM as trustee for the MPF was granted second priority to the extent of the Principal Amount of \$11M plus interest, Other Moneys and Enforcement Expenses as those terms are defined therein;
 - (c) by clause 8, LMIM as trustee for the MPF was required to provide a release of any security held by it where an asset the subject of any security held by PTAL was sold pursuant to a bona fide sale for approximately fair market value.
13. From in or about March 2006 Belpac was in default under the FMIF Belpac loan and PTAL as custodian of LMIM as RE of the FMIF was entitled to exercise rights under the PTAL Mortgage and the PTAL Charge.
14. On or about 6 May 2009 PTAL appointed receivers and managers to Belpac.

15. On or about 30 July 2009 voluntary administrators were appointed to Bellpac.
16. On or about 3 September 2009, Bellpac was placed into liquidation following a resolution of its creditors.

Bellpac sale of the Property to Gujarat

17. On or about 22 September 2004 Bellpac and GPC Equipment Pty Ltd (**GPC**) and Gujarat NRE Coking Coal Limited (formerly Gujarat NRE Minerals Limited)(**Gujarat**), Bounty Industries Australia Pty Limited (**Bounty**) and Coalfields (NSW) Pty Limited (**Coalfields**) entered into a Land and Asset Sale Agreement (**LASA**) pursuant to which Bellpac agreed to sell to Gujarat and Coalfields certain assets including, inter alia, the Property.
18. In addition to the LASA, Bellpac and GPC and Gujarat and Coalfields entered into certain other agreements on or about 3 December 2004 which, inter alia, amended the LASA (**2004 Agreements**).
19. A dispute arose between Bellpac and Gujarat as to the parties' rights, obligations and liabilities under the LASA and the 2004 Agreements (**Dispute**).
20. In 2007 and 2008 Bellpac and Gujarat executed settlement deeds (**Settlement Deeds**) in order to resolve the Dispute.
21. In 2009, a dispute arose between LMIM, PTAL and Bellpac and Gujarat and Coalfields as to the parties' rights, obligations and liabilities under and as a consequence of the LASA, the 2004 Agreements and the Settlement Deeds (**2009 Dispute**).
22. Legal proceedings were commenced by:
 - (a) Gujarat against Bellpac in or about May 2009 (**Gujarat proceedings**);
 - (b) LMIM, PTAL and Bellpac against Gujarat in or about July 2009 with further defendants, including Coalfields, Bounty and GPC, joined in or about November 2009 (**Bellpac proceedings**);
 - (c) by Coalfields against Bellpac and Gujarat by cross-claim in the Gujarat proceedings (**Coalfields cross-claim**),together (the **Proceedings**).

Funding of the Proceedings

23. In or about July 2009 the first to sixth defendants formed the view that LMIM as RE of the FMIF was not in a position to fund the Proceedings.
24. From in or about July 2009, as registered mortgagee of the Property with second priority under the Deed of Priority, LMIM as trustee of the MPF:
 - (a) funded the Proceedings as second mortgagee in an amount of not more than \$1,380,431.51; and
 - (b) drew down such funding against the MPF Bellpac Loan.

Mediation Heads of Agreement

25. In or about November 2010, a non-binding Heads of Agreement recording Agreement in Principle was executed in the course of a mediation between the parties to the Proceedings (**Mediation Heads of Agreement**).
26. Pursuant to the Mediation Heads of Agreement:

- (a) the Property was to be sold to Gujarat or its nominee by either the liquidator of LMIM (with mortgagees' consent) or via a mortgagee sale for an amount up to \$65.5M as follows:
 - (i) \$15.5M to be paid by:
 - (A) An instalment of \$1M within 1 month; and
 - (B) \$14.5M within 6 months;
 - (ii) Vendor finance for \$46-50M (to be updated on amortisation);
- (b) LMIM was to pay \$1.3M to Coalfields (NSW) Pty Limited ACN 111 369 110 to secure its release of certain caveats over the Property;
- (c) LMIM was to be granted an option to purchase a half share in the Property for \$15M in certain circumstances.

27. The parties continued to negotiate a settlement of the Proceedings between November 2010 and June 2011.

Settlement of the LMIM Bellpac proceedings

28. On or about 21 June 2011:

- (a) LMIM in its capacity as RE for FMIF, PTAL, Bellpac, Gujarat and Southbulli Holdings Pty Limited (**Southbulli**) executed a Deed of Release pursuant to which the parties agreed to settle all of their disputes, including the disputes in the Proceedings and to regulate their relationship (**Deed of Release**);
- (b) simultaneously with the execution of the Deed of Release, PTAL, LMIM in its capacity as RE for FMIF, Bellpac, Gujarat, Southbulli and Coalfields executed a Deed of Settlement and Release pursuant to which these parties agreed to settle their differences in respect of the Proceedings (**Deed of Settlement and Release**); and
- (c) PTAL, as mortgagee exercising power of sale under the PTAL Mortgage, entered into a contract to sell the Property to Gujarat for a purchase price of \$10M exclusive of GST (**Gujarat Contract**).

29. By clause 7 of the Deed of Release Gujarat was obliged to pay to PTAL the settlement sum of \$35.5M exclusive of GST by way of bank cheque simultaneously with the execution and delivery of that deed.

30. By clause 2 of the Deed of Settlement and Release:

- (a) PTAL was to pay to Coalfields the sum of \$1.3M by bank cheque simultaneously with the execution and delivery of that deed;
- (b) the sum of \$1.3M was to be held in trust until completion of the Gujarat Contract; and
- (c) if the Gujarat Contract was terminated the sum of \$1.3M, together with any accretions thereon, was to be refunded in full to PTAL.

Deed Poll

31. On or about 21 June 2011, a Deed Poll was executed by the first to sixth defendants as directors of LMIM.

32. The Deed Poll provided, inter alia, that:

- (a) "**Settlement Proposals means the Bellpac Settlement and the Proceeds Split**";

- (b) *"Proceeds Split means the proposal between FMIF and MPF under which it is proposed to split the proceeds that it has recovered from the litigation in the ratio of 65% of the proceeds to the FMIF and 35% of the proceeds to MPF";*
 - (c) *"Bellpac Settlement means the principal agreement that has been reached between LM and Gujarat pursuant to which LM will inter alia sell the Bellpac Land to Gujarat and settle the litigation with Gujarat for a total consideration of \$45.5 Million and the RE will pay \$1.3m to Coalfields to secure the withdrawal of certain caveats";*
 - (d) *"The FMIF and the MPF did not enter into any formal agreement to split the proceeds recovered by the litigation however it was the understanding of LM's directors that it was appropriate for MPF's contribution to be recognised by providing MPF with a share of any proceeds recovered by the litigation";*
 - (e) *"after giving full and comprehensive consideration to all of the relevant issues, the directors have concluded ..." inter alia:*
 - (i) *"there is a need for the FMIF RE to reach agreement with the MPF trustee about sharing the litigation settlement proceeds with the MPF because the overall settlement cannot occur without the agreement of the MPF trustee";*
 - (ii) *"LM as trustee of MPF will comply with its general law fiduciary duties as a trustee if it agrees to the Settlement Proposals pursuant to which MPF will be obliged to release its security over the Bellpac Land".*
33. Contrary to the matters set out in the Deed Poll referred to in paragraph 32(d) above the first to sixth defendants:
- (a) did not in fact have an understanding that it was appropriate for MPF's contribution to the funding of the LMIM Bellpac proceedings to be recognised by providing MPF with a share of any proceeds recovered by the litigation;
 - (b) had an expectation that if LMIM and PTAL were successful in the Proceedings and the Property was developed by LMIM as RE for the FMIF then:
 - (i) the amount owed under the FMIF Bellpac loan would be repaid in full; and
 - (ii) the amount owed under the MPF Bellpac loan would be repaid in part and possibly in full.
34. Contrary to the matters set out in the Deed Poll referred to in paragraph 32(e) above:
- (a) in circumstances where:
 - (i) pursuant to the Gujarat Contract, PTAL sold the Property to Gujarat as mortgagee exercising power of sale; and
 - (ii) in any event the Deed of Priority contains the terms pleaded in paragraph 12 above,

LMIM as trustee of the MPF could not have prevented the sale of the Property to Gujarat under the Gujarat Contract by refusing to provide a release of the MPF Mortgage over the Property; and
 - (b) there was no necessity for LMIM as RE of FMIF to reach agreement with LMIM as trustee of the MPF about sharing the amounts payable to PTAL under the Deed of Release or the Gujarat Contract because:
 - (i) LMIM as trustee of the MPF was not a party to the Deed of Release nor the Gujarat Contract;

- (ii) the agreement of LMIM as trustee of the MPF was not required in order for LMIM as RE of the FMIF or PTAL to perform their obligations under the Deed of Release and the Gujarat Contract.

Payment to MPF of monies payable to FMIF by Gujarat under Gujarat Contract and Deed of Release

- 35. LMIM as trustee of the MPF received the sum of \$15,546,147.85 (**Settlement payment**) from the proceeds payable to PTAL as custodian of LMIM as RE of the FMIF pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.
- 36. LMIM directed that the Settlement payment be made to LMIM as trustee of the MPF from the amounts payable to LMIM as RE of the FMIF and PTAL pursuant to the terms of the:
 - (a) Gujarat Contract; and
 - (b) Deed of Release.
- 37. LMIM as trustee of the MPF had no entitlement to payment of the Settlement payment:
 - (a) in circumstances where:
 - (i) PTAL sold the Property as mortgagee in possession under the PTAL Mortgage; and
 - (ii) PTAL was, as at 22 June 2011, owed the sum of \$52,480,469.12 by Bellpac comprising the Principal Amount, Interest, Other Moneys and Enforcement Expenses (as those terms are defined in the Deed of Priority); and
 - (b) by reason of the matters pleaded in paragraphs 33 and 34 above.

Contraventions of s 180, 181 and 182 of the Corporations Act

- 38. At all material times in their capacity as directors of LMIM, the first to sixth defendants owed duties to LMIM under:
 - (a) section 180(1) of the Act and at general law to exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in LMIM's circumstances, and occupied the office held by, and had the same responsibilities within LMIM as the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 181(1) of the Act and at general law to exercise their powers and discharge their duties in good faith and in the best interests of LMIM and for a proper purpose;
 - (c) section 182(1) of the Act and at general law not to improperly use their position to gain an advantage for themselves or someone else, or to cause detriment to LMIM.
- 39. In the premises pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above the first to sixth defendants:
 - (a) failed to exercise their powers and discharge their duties with a reasonable degree of care and diligence;
 - (b) did not act in good faith and in the best interests of LMIM, or for a proper purpose;
 - (c) improperly used their position as directors of LMIM to gain an advantage for the MPF;

(d) in the premises, acted in breach of the duties pleaded in paragraph 38 above.

40. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment.

LMIM's involvement in contraventions by directors

41. LMIM knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

42. By reason of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13, 17-37 and 41 above LMIM was involved in the contraventions of the duties pleaded in paragraph 39 above.
43. In the premises LMIM is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment.

Contravention of s 601FD of the Corporations Act

44. At all material times in their capacity as officers of LMIM as RE of the FMIF, the first to sixth defendants owed duties under:
- (a) section 601FD(1)(b) of the Act to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) section 601FD(1)(c) of the Act to act in the best interests of members of the FMIF and, if there is a conflict between the members' interests and the interests of the RE, give priority to the members' interests;
 - (c) section 601FD(1)(e) not to make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the member of the FMIF.
45. In the premises pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above the first to sixth defendants:
- (a) failed to exercise the degree of care and diligence that a reasonable person would exercise were they in the position of the first, second, third, fourth, fifth and sixth defendants respectively;
 - (b) did not act in the best interests of the members of the FMIF and give priority to the interests of the members of the FMIF;
 - (c) improperly used their position as officers of the RE of FMIF to gain an advantage for the MPF;
 - (d) in the premises, acted in breach of the duties pleaded in paragraph 44 above.
46. In the premises, the first to sixth defendants are liable to pay to the plaintiff compensation under s 1317H of the Act or damages at general law in the amount of the Settlement payment.

LMIM's involvement in contraventions by officers

47. LMIM knew of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 above.

Particulars

LMIM's knowledge arises by reason of its position as former trustee of the MPF and by virtue of the knowledge of the first to sixth defendants being directors of LMIM as former trustee of the MPF.

48. By reason of the matters pleaded in paragraphs 1(b), 1(c), 2, 5-13 and 17-37 and 47 above LMIM was involved in the contraventions of the duties pleaded in paragraph 45 above.
49. In the premises, LMIM is liable to pay to the plaintiff under s 1317H of the Act compensation in the amount of the Settlement payment.

Rights of LMIM as former trustee of the MPF and the Plaintiff's right of subrogation

50. As former trustee of the MPF LMIM has a right of indemnity out of the assets of the MPF with respect to any liability of LMIM in these proceedings.
51. Any right of indemnity of LMIM as former trustee of the MPF operates as an equitable lien over the assets of the MPF.
52. The eighth defendants hold the assets of the MPF subject to any right of indemnity and lien of LMIM over those assets.
53. LMIM is insolvent.
54. By reason of the matters pleaded in paragraphs 50 to 53 above, the plaintiff is entitled to be subrogated to LMIM's right of indemnity and lien to the extent of LMIM's liability in these proceedings.

The Plaintiff claims the following relief:

1. As against the first defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the first defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
2. As against the second defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the second defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
3. As against the third defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the third defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.

4. As against the fourth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fourth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
5. As against the fifth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the fifth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
6. As against the sixth defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the sixth defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of \$15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
7. As against the seventh defendant:
 - (a) An order under s 1317H of the *Corporations Act 2001* (Cth) that the seventh defendant, pay to the plaintiff compensation or damages in an amount of \$15,546,147.85;
 - (b) Interest under s 58 of the *Civil Proceedings Act 2011* (Qld) on the amount of 15,546,147.85 from 8 September 2011 until the date of judgment; and
 - (c) Costs.
8. As against the seventh and eighth defendants a declaration that:
 - (a) The seventh defendant is entitled to be indemnified out of the assets of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (b) The seventh defendant has a lien or charge over the assets and undertakings of the MPF in respect of the liability of the seventh defendant to the plaintiff in these proceedings;
 - (c) The plaintiff is entitled to be subrogated to the rights of the seventh defendant in respect of the assets of the MPF.

This pleading was settled by Ms Madelaine Luchich of Junior Counsel.

Signed:

Cadams

Description: Solicitors for the Plaintiff

Dated: 19 December 2014

NOTICE AS TO DEFENCE

Your Defence must be attached to your Notice of Intention to Defend.

SUPREME COURT OF QUEENSLAND

**REGISTRY: BRISBANE
NUMBER: 12317/14**

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

AND

First Defendant: PETER CHARLES DRAKE

AND

Second Defendant: LISA MAREE DARCY

AND

Third Defendant: EGHARD VANDER HOVEN

AND

Fourth Defendant: FRANCENE MAREE MULDER

AND

Fifth Defendant: JOHN FRANCIS O'SULLIVAN

AND

Sixth Defendant: SIMON JEREMY TICKNER

AND

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

AND

**Eighth Defendants: KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES
OF THE LM MANAGED PERFORMANCE FUND**

A. DETAILS OF INTERLOCUTORY APPLICATION

This application is made under section 500(2) of the *Corporations Act 2001* (Cth).

Interlocutory Application
Filed on behalf of the Applicant Plaintiff
Form 3 v2 R. 2.2

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: +07 3231 1666
Fax No: 07 3229 5850
JSO/SZC:201401822

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On the facts stated in the supporting affidavit(s), the applicant plaintiff applies for the following interlocutory relief:

1. That pursuant to section 500(2) of the *Corporations Act 2001* (Cth), the applicant plaintiff be granted leave nunc pro tunc to commence and proceed with Supreme Court Proceeding numbered 12317 of 2014 against the seventh defendant, LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461.
2. Such further or other order as the Court deems appropriate.
3. The costs of this application be costs in the proceeding.

Date: 4 February 2015

Gadens

Gadens Lawyers
Solicitors for the applicant plaintiff

B. NOTICE TO RESPONDENTS

TO: John Richard Park and Ginette Dawn Muller as Liquidators of LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461
c/- FTI Consulting
'Corporate Centre One', Level 9
2 Corporate Court
BUNDALL QLD 4217

AND: LM Investment Management Limited (Receivers and Managers Appointed)
(In Liquidation) ACN 077 208 461
c/- FTI Consulting
Corporate Centre One
Level 9, 2 Corporate Court
BUNDALL QLD 4217

This application will be heard by the Supreme Court of Queensland, Brisbane Registry at QEII Courts of Law Complex, 415 George Street, Brisbane at 10am on *12 Feb 2015*

If you wish to oppose this application or to argue that any different order should be made, you must appear before the Court in person or by your lawyer and you shall be heard. If you do not appear at the hearing the orders sought may be made without further notice to you. In addition you must before the day for hearing file a notice of appearance in this Registry. The notice should be in Form 4. You must serve a copy of it at the applicant's address for service shown in this application as soon as possible.

Note: Unless the Court otherwise orders, a respondent that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.

C. FILING

This interlocutory application is filed by Gadens Lawyers for the applicant.

D. SERVICE

The applicant's address for service is c/- Gadens Lawyers, Level 11, 111 Eagle Street, Brisbane, ph: (07) 3231 1666; fax (07) 3229 5850.

It is intended to serve a copy of this interlocutory application on each respondent and on any person listed below:

John Richard Park and Ginette Dawn Muller as Liquidators of LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461
c/- FTI Consulting
'Corporate Centre One', Level 9
2 Corporate Court
BUNDALL QLD 4217

LM Investment Management Limited (Receivers and Managers Appointed)
(In Liquidation) ACN 077 208 461
c/- FTI Consulting
Corporate Centre One
Level 9, 2 Corporate Court
BUNDALL QLD 4217

Note: An address for service must include telephone number, fax number, email address and document exchange address when appropriate.

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 12317/14

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

AND

First Defendant: **PETER CHARLES DRAKE**

AND

Second Defendant: **LISA MAREE DARCY**

AND

Third Defendant: **EGHARD VAN DER HOVEN**

AND

Fourth Defendant: **FRANCENE MAREE MULDER**

AND

Fifth Defendant: **JOHN FRANCIS O'SULLIVAN**

AND

Sixth Defendant: **SIMON JEREMY TICKNER**

AND

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

AND

Eighth Defendants: **KORDA MENTHA PTY LTD ACN 100 169 391 AND
CALIBRE CAPITAL PTY LTD ABN 66 108 318 985 IN
THEIR CAPACITY AS JOINT AND SEVERAL TRUSTEES
OF THE LM MANAGED PERFORMANCE FUND**

ORDER

Before:

Date: 12 February 2015

Initiating document: Interlocutory Application filed 4 February 2015

ORDER
Filed on Behalf of the Plaintiff
Form 59 Rule 661

GADENS LAWYERS
Level 11, 111 Eagle Street
BRISBANE QLD 4000
Tel No.: 07 3231 1666
Fax No: 07 3229 5850
BNEDOCs Order (12_02_15)

THE ORDER OF THE COURT, BY CONSENT, IS THAT:

1. Pursuant to section 500(2) of the *Corporations Act 2001* (Cth), the applicant plaintiff be granted leave nunc pro tunc to commence and proceed with Supreme Court Proceeding numbered 12317 of 2014 against the seventh defendant, LM Investment Management Limited (Receivers & Managers Appointed) (In Liquidation) ACN 077 208 461.
2. The liquidators of the seventh defendant are reserved liberty to apply to the Court to revoke the grant of leave pursuant to this order.
3. The plaintiff may not enforce any judgment against the seventh defendant without leave of the Court, with such leave not to be sought without the plaintiff first giving the liquidators of the seventh defendant seven days' notice in writing of its intention to do so.
4. The costs of this application be costs in the proceeding.

Signed: