

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**

JOHN RICHARD PARK of 22 Market Street, Brisbane, Queensland, Official Liquidator and Chartered Accountant states on oath:-

1. I am an official liquidator and chartered accountant. I am the first named First Applicant in this proceeding.

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AFFIDAVIT OF JOHN RICHARD PARK

Filed on behalf of the Applicants

Form 46 Rule 431

Russells
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-
2. I refer to:-
- (a) my earlier affidavit in respect of this application, filed in this proceeding on 28 January, 2016 (“**my First Affidavit**”);
 - (b) the affidavit of Mr Whyte in respect of this application, filed in this proceeding on 19 February, 2016 (“**Mr Whyte’s Affidavit**”); and
 - (c) my earlier affidavit in respect of this application, filed in this proceeding by leave at the hearing on 22 February, 2016 (“**my Second Affidavit**”).

3. Save as where otherwise indicated, capitalised terms in this affidavit have the same meaning as in my First and Second Affidavits.

4. Now produced and shown to me and marked “**JRP-3**” is an indexed, paginated bundle of documents to which I shall refer in this affidavit. References to page numbers in [] are references to the page numbers of JRP-3.

5. I understand from:-

- (a) Mr Whyte’s Affidavit; and
- (b) the reports I received from my solicitors and Ms Kelly Trenfield, a Senior Managing Director of FTI Consulting, who were present in Court on 22 February, 2016,

that some of the concerns raised by Mr Whyte are:-

- (i) the volume (and quantum) of work performed subsequent to his appointment;
- (ii) how such work relates to the FMIF; and
- (iii) what role LMIM had to play as responsible entity of the FMIF subsequent to Mr Whyte’s appointment as the court appointed receiver to supervise the winding up of the FMIF.

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6. As I deposed in my First Affidavit, I believe that the work undertaken by my staff was reasonably necessary for the proper administration of the winding up of LMIM and, where that remuneration is sought from its assets, the FMIF.

7. In particular, it is not the case that my staff and I simply ceased all work in relation to the FMIF immediately upon Mr Whyte's appointment. Nor, in my view, would that step have been in the interests of the FMIF.

8. I have caused my solicitors to prepare a schedule setting out the amounts which are referred to in paragraphs 87 and 100 of my First Affidavit, copies of which appear at [1] to [2].

9. The most substantial amount of work for Category 1 – FMIF remuneration is that which immediately followed Mr Whyte's appointment, in the period from 8 August, 2013 to 31 December, 2013, totalling \$291,972.00.

Category 1 – FMIF

Pre-Order Period: 8 August, 2013 to 21 August, 2013

10. While the reasons of this Court in proceeding 3383 of 2013 were delivered on 8 August, 2013, the final form of order appointing, and importantly, empowering Mr Whyte was not made until 21 August, 2013.

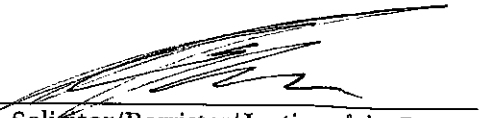
11. In particular, Justice Dalton ordered, on 8 August, 2013:-

- (a) that LMIM wind up the FMIF;
- (b) that "...Mr Whyte, liquidator, [sic] is appointed to take responsibility for the winding up of the ...[FMIF]";

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(c) that "...Mr David Whyte, liquidator, [sic] be appointed receiver of the property of the ...[FMIF]"

12. Between 8 August, 2013 and 21 August, 2013, LMIM was, in practical terms, still responsible for the administration of the FMIF. During that period, my staff and I had some initial meetings with Mr Whyte and his staff but it was my staff who retained responsibility for the ongoing work required to manage the FMIF.

13. I have reviewed (in a brief and summary way) the schedule of work performed by BDO staff for the period between 8 August, 2013 and 21 August, 2013 which is exhibited to the affidavit sworn by Mr Whyte on 2 May, 2014 in support of his application for approval of his remuneration for the period from 8 August, 2013 to 31 March, 2014.



14. My review of those time entries accords with my recollection of the position, as was the fact, referred to in paragraph 12 herein. The time entries are relatively few in number and value. They may, in my view, be fairly categorised as reflecting the position that Mr Whyte and his staff were making initial enquiries to familiarise themselves at a broad level with the position of the FMIF.

15. Most of the work performed by Mr Whyte and his staff during that period related to:-

- (a) initial conferences with the staff of FTI Consulting, LMA or David Clout & Associates (LMA's liquidator);
 - (b) reviewing the loan book and considering the initial strategy to be adopted;
- and

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(c) attending to the necessary administrative tasks which accompanies any new insolvency appointment (setting up a website, preparing the necessary ASIC forms, arranging for insurance etc.).

16. I formed the view that, because this Court had not yet formalised the roles and responsibilities of the parties, it was appropriate and necessary for LMIM to continue the day to day operation of the FMIF.

17. I have caused to be calculated, from the Excel spreadsheets which are reproduced at pages [611] to [678] of the exhibits to my First Affidavit, the remuneration which relates to Category 1 – FMIF for the period between 8 August, 2013 and 21 August, 2013. Those time entries total \$76,745.00, which is 26.29% of all of the work charged for Category 1 FMIF for the period between 8 August, 2013 and 31 December, 2013.

18. I have caused to be calculated, from the Excel spreadsheets which are reproduced at pages [611] to [678] of the exhibits to my First Affidavit, the remuneration which relates to Category 1 FMIF for the period between 21 August, 2013 and 4 September, 2013 (the first two weeks of Mr Whyte's appointment). Those time entries total \$53,328.00, which is 18.26% of all of the work charged for Category 1 FMIF for the period between 8 August, 2013 and 31 December, 2013.


Period following 21 August, 2013

19. Following the formal orders made by this Court on 21 August, 2013, I and my staff were still required to perform work which I consider to be of direct relevance to the FMIF and which was reasonably necessary for the proper administration of the

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FMIF. I have set out below in more detail the categories of work performed during the period subsequent to 21 August, 2013 and the relevance to the FMIF; much of the relevance of the work falls from the actual description of the work undertaken in the categories and time entries.

20. The explanation which follows is not an explanation of all of the work performed in Category 1 – FMIF following Mr Whyte’s appointment. I have previously deposed to how that work was recorded, the system in place for ensuring it related to the FMIF and my belief that the remuneration was reasonable and necessary for the administration of the FMIF.

21. Rather, I have considered some of the larger categories of tasks with a view to explaining why those particular categories of work were necessary following Mr Whyte’s appointment.

22. For example, category C14 relates to reviewing notices of demand, default and foreclosure in respect of the FMIF’s security position. After 8 August, 2014, only 0.1 hours of staff time was charged. For that reason, that category (and others like it) is not specifically addressed below.

23. I have reviewed the time entries which form the basis of the Category 1 – FMIF claims referred to in my First Affidavit. After 21 August, 2013, those entries reflect, as was the fact, that the work fell into the following primary categories of work being performed (which are in accordance with my recollection of events and the schedule of tasks which appears at [594] to [603] of the exhibits to my First Affidavit, “**Task Schedule**”):-

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- (a) reviewing and updating cash flow models for the purpose of discussion and handover of the day to day running of the FMIF to McGrath Nicol and BDO, reflected in category C6 in the Task Schedule.

In my view this work was necessary and connected to the FMIF because it facilitated the handover of the operations of the FMIF in accordance with the orders of this Court;

- (b) liaising (including meetings in person, written correspondence and telephone conferences) with McGrath Nicol and BDO concerning issues related to:-
- (i) the handover of day to day FMIF operations;
 - (ii) queries from McGrath Nicol or BDO related to the procedures in place for managing books and records and information technology issues;
 - (iii) the scope of the work required of the responsible entity, LMIM, going forward;
 - (iv) staffing levels, the status of the various assets and insurance issues;
 - (v) the possibility of refinancing the debt owed to Deutsche Bank, with a view to McGrath Nicol retiring;
 - (vi) LMIM's and my and Ms Muller's right of indemnity,
- reflected in categories A1 to A5 and G8 of the Task Schedule

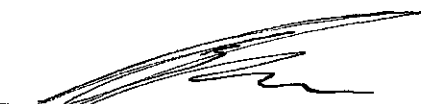
In my view this work was necessary and connected to the FMIF because:-

- A. it facilitated, and was part of, the handover of the operations of the FMIF in accordance with the orders of this Court; and

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- B. it concerned creditors who had direct interests in the assets of the FMIF;
- (c) dealing with the Controllership matters (noting, as deposed to in paragraph 25 of my First Affidavit, that LMIM did not cease acting as controller of the various assets until 24 September, 2014, at which time LMIM was replaced in that role by Mr Whyte and Mr Fielding (of BDO) pursuant to an order of this Court made on 15 September, 2013 in proceeding number 3383 of 2013), where the work is not specifically referable to a particular asset of or borrower from the FMIF (and would therefore have been recorded as Category 1 time, not Category 3 time), including, for example:-
- (i) arranging for Controllership payments;
 - (ii) preparing and facilitating the necessary ASIC reporting in respect of the Controllerships (which was different to the ASIC reporting required in the winding up of LMIM);
 - (iii) liaising with staff of LMA, McGrath Nicol and BDO regarding asset sales,
- reflected in categories D1 to D7 of the Task Schedule.

That category of work also included items of work undertaken where several Controllerships were dealt with at once. For example, Mr Corbett may have approved a list of payments relating to 10 particular assets or borrowers but the task only took 4 units of time. In that case, it would be inequitable to charge each Controllership a unit of time so the work was recorded as general Category 1 – FMIF time.

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In my view this work was necessary and connected to the FMIF because it related only to borrowers in respect of whom the FMIF held securities and therefore, related directly to the assets of the FMIF;


- (d) reviewing loan book documentation, preparing loan book strategy, reviewing and facilitating requests for payments out of the FMIF, liaising with PTAL in respect of issues relating to security and releases, and liaising with McGrath Nicol and BDO staff in that regard, reflected in categories C2, C4 and C5 of the Task Schedule. At [3] to [8] is a bundle of documents, by way of example, relevant to one such payment issue.

Most of the work described therein also relates to Controllership time not specifically allocated to Category 3, in accordance with the practice explained at paragraph 23(c) herein. In particular, the Controllership appointment documents I describe in paragraph 23 of my First Affidavit appoint LMIM, in its own right, as PTAL's agent. Following legal advice (the privilege in which I do not intend to waive), I formed the view that those appointment documents required LMIM to exercise its judgement objectively and independently in discharging its functions as controller. For that reason, I believe it was appropriate for LMIM to maintain independent oversight of what was occurring in respect of loan book management.

In my view this work was necessary and connected to the FMIF because it facilitated payments being made from the assets of the FMIF which were, at the time, judged by me and my staff to be necessary for the purposes of the FMIF (for example, further development funding being provided to a



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borrower or the payment of the expenses associated with the running of the FMIF);

- (e) investigating and considering the possibility of a settlement with LMIM's insurer which would encompass the claims of all parties with a potential claim against the relevant insurance policy, including:-
- (i) giving instructions to and receiving advice from my solicitors in relation to that matter, Clayton Utz;
 - (ii) liaising with McGrath Nicol and BDO about their interest in such a settlement arrangement; and
 - (iii) responding to requests for information made by the insurer in relation to potential claims against LMIM in respect of which there was a *prima facie* right of indemnity against the assets of the FMIF,


as reflected in categories C8, G4 and G17 of the Task Schedule.

In my view this work was necessary and connected to the FMIF because it involved seeking to protect the assets of the FMIF as Ms Muller and I formed the view that unless the insurance policy was protected, the assets of the FMIF may be exposed to a claim for liability as a result of LMIM's right of indemnity which may exist in respect of claims against LMIM. Following legal advice (the privilege in which I do not intend to waive), Ms Muller and I investigated the possibility of a settlement with the insurer so as to resolve the claim against the insurer and the various claims against LMIM in respect of which there may be a right of indemnity from the assets of the FMIF as cost effectively and commercially as possible;

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- (f) receiving enquiries from creditors who may be indemnified out of the assets of the FMIF, investors and investor advisors of the FMIF and liaising with McGrath Nicol and BDO as to the response, reflected in categories J1 and J2 of the Task Schedule.

In my view this work was necessary and connected to the FMIF because it related only to those creditors, investors or investor advisors of the FMIF;

- (g) perusing the various updates from BDO as to the status of the winding up of the FMIF. Between 21 August, 2013 and 30 September, 2015, Mr Whyte produced ten updates to investors.

Because the time entries relevant to that task were not specifically allocated a task code, I can only estimate the amount of work done in this respect based on searches of the time entries. I have caused to be calculated, from the Excel spreadsheets which are reproduced at pages [611] to [678] of the exhibits to my First Affidavit, the remuneration which relates to perusing those updates. On that basis, I believe my staff and I spent a total of 11.9 hours on the task, costing \$6,240.50 (excl. GST).

In my view this work was necessary and connected to the FMIF because the responsible entity, LMIM, has an obligation to keep itself informed about the operations of the FMIF;

- (h) reviewing the material prepared by Mr Whyte in support of each of his various applications for remuneration, though I only instructed my



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solicitors to appear on the first of Mr Whyte's four applications, reflected in category G16 of the Task Schedule.

In my view this work was necessary and connected to the FMIF because the responsible entity, LMIM, is a proper respondent to those applications and has an interest in protecting the assets of the FMIF by ensuring the charges levied against it are reasonable and limited;

- (i) preparation and review of claims for indemnity against the assets of the FMIF for creditors who may be indemnified out of the FMIF, operational costs, legal costs and my and Ms Muller's remuneration, reflected in categories G15 and I1.

In my view this work was necessary and connected to the FMIF because it concerns direct claims against the assets of the FMIF;

- (j) responding to numerous requests for further information from BDO, McGrath Nicol and Tucker & Cowen regarding the matters referred to in sub-paragraph 23(i). Up until the orders of this Court on 14 May, 2015 in proceeding number 4526 of 2015, Mr Whyte did not have unrestricted access to the entirety of the books and records of LMIM and LMA and would, from time to time, make requests for information from my staff.

In my view this work was necessary and connected to the FMIF because it facilitated the handover of the operations of the FMIF in accordance with the orders of this Court.

24. In addition to those matters, Ms Muller and I have also included our and our staff's time for work relevant to particular pieces of litigation which we consider to be directly for the benefit of the FMIF. Those proceedings, which are reflected in categories F1 to F9 of the Task Schedule, are:-

- (a) the proceedings in which Mr Whyte was appointed, being proceeding number 3383 of 2013 in this Court. The principal object of those proceedings was an application by Mr and Mrs Bruce (members of the FMIF) to have LMIM replaced as the responsible entity of the FMIF by Trilogy Funds Management Limited. That application was dismissed, though a cross-application by Mr Shotton and ASIC to direct LMIM to wind up the FMIF and to appoint a person pursuant to section 601NF of the Act resulted in the order which was ultimately made;
- (b) the appeal against Her Honour Justice Dalton's decision in those proceedings, being Court of Appeal proceeding number 8895 of 2013, which I considered was necessary and in the interests of the FMIF because I was concerned about the costs and logistical difficulties involved in having two insolvency practitioners appointed to the FMIF;
- (c) the originating application made in these proceedings, which resulted in the reasons of this Court in *Park & Muller v Whyte* [2015] QSC 283.

25. After 30 June, 2014, the entries in categories F1 to F9 reflect work principally in relation to the 'residual powers' proceeding (the proceeding referred to in paragraph 24(c) herein) and matters incidental to the proceedings before Justice Dalton, such as dealing with costs orders. Again, in my view, such costs were necessary and connected to the FMIF.

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26. I believe that the work which has been allocated to Category 1 – FMIF for the period following Mr Whyte’s appointment is reasonable and was necessary to be undertaken.

Category 2

27. Though I address the basis and reasonableness of Category 2 work in my First Affidavit, given the concerns raised by Mr Whyte, I wish to provide some further information and clarification.

28. For the same reasons set out in paragraph 95 of my First Affidavit, I have not caused to be prepared a task schedule for Category 2 work, similar to the schedule which has been prepared for Category 1 – FMIF work.

29. Accordingly, without manually reconsidering each and every time entry, I cannot now depose with specificity to all of the work which may have been charged to the LM as responsible entity time code referred to in paragraph 36(a) of my First Affidavit (though I have previously reviewed the time entries for reasonableness and relevance, as deposed to in my First Affidavit).

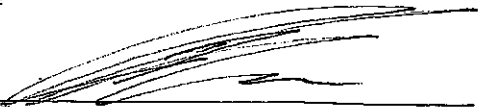
30. With that qualification in mind, I have reviewed, in a summary way, the time entries for Category 2 with a view to identifying particularly significant categories of work or work which is repeated throughout the material.

31. I have previously deposed to my view that maintaining the services of LMA, at least for the period of voluntary administration was critical to preserving the funds management business which protected and managed the assets of the Funds (and is a matter in respect of which I sought legal advice). That remains my view.

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LMA – Category 2


32. The Category 2 entries reflect the following categories of work being performed in relation to LMA, which I believe were in the interests of all Funds, including the FMIF:-

- (a) dealing with LMA employees and considering the need for redundancies;
- (b) tasks which I would describe as those incidental to 'running the business', including, for example, communicating with suppliers, arranging for the payment of expenses, reviewing and considering the ongoing need for any agreements or procedures in place at the time of my and Ms Muller's appointment;
- (c) considering, taking legal advice on and carrying into effect the LMA Services Agreement;
- (d) maintaining accounts and financial records of the business (including, for example, creating MYOB entries, preparing payroll tax statements etc.);
- (e) preparing and updating cash flow projections;
- (f) dealing with leasing issues relating to the premises from which LMA operated its business; and
- (g) analysing operational costs, including calculating and paying those costs and considering strategies for how they might be reduced during the course of my and Ms Muller's appointment.

33. Because of how Category 2 was defined at the beginning of my and Ms Muller's appointment, these tasks do not, by definition, relate specifically to assets or liabilities of any particular Fund.

34. Nevertheless, I believe they are connected with the Funds because:-

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-
- (a) LMIM carried on business as a professional trustee and in the course of that business engaged LMA to assist with the administrative aspects of that trustee business;
 - (b) the actual business of managing and protecting those trusts (that is, the Funds) was performed by the managers and staff of LMA; and
 - (c) LMA's services were critical to maintaining the asset position of the Funds during the period of the voluntary administration.

35. I believe that my and Ms Muller's Category 2 remuneration relating to LMA is for the benefit of the Funds as a whole because Ms Muller and I formed the view that it was of fundamental importance to the Funds that LMA continue to provide the services it did. Ms Muller and I, as administrators of LMA, were required to control the operation of that business for the benefit of the Funds. The consequence of not maintaining the services provided by LMA would have resulted in significantly increased costs to the Funds, because that work would have had to be performed by another entity unfamiliar with the day to day operations.

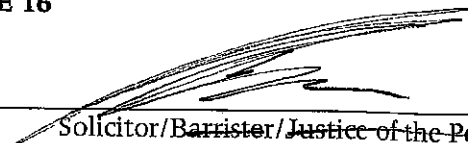
36. Additionally, my staff and I have taken care to separate the work which relates to LMA as a corporate entity and is incidental to the winding up of the company from work which was necessary for the management of the business conducted by LMA for the benefit of the Funds. That is the purpose of the Category 2 delineation.

37. On 22 July, 2013 Ms Muller and I sent a circular to the committee of creditors of LMA which included a remuneration report, a copy of which appears at [9] to [22].

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LMIM – Category 2

38. The Category 2 entries reflect the following categories of work being performed in relation to LMIM which I believe was for the benefit of all Funds, including the FMIF:-

- (a) work which was, in the view of my staff from time to time, inequitable to charge to a particular Fund. For example, if a member of my staff spent two units of time responding to requests for information from investors in four Funds, that time would be recorded as Category 2 time on the basis that it would not be proper to charge a single unit to each of the four Funds and the time recording system did not permit charging a half unit of time;
- (b) tasks incidental to the ongoing trading of the business, relevant to LMIM's role as responsible entity, which included, for example, creating protocols for how payments from Fund assets were to be made and then working within those protocols;
- (c) dealing with media enquiries as to the state of the Funds (there was substantial media interest in the administration at the time);
- (d) responding to requests for information from the ASIC pursuant to section 30 of the *Australian Securities and Investments Commission Act 2001* and section 912C(1) of the Act, where those requests related to the Funds together, rather than any particular asset or Fund. An example of such a notice, sent by ASIC on 30 April, 2013 appears at [23] to [31];
- (e) dealing with matters relating to the various books and records issues which have arisen. Because LMIM's and LMA's records were intermingled such that it was not possible to clearly identify a single set of 'books and records' for any given Fund, a number of applications have been brought in this Court regarding various entities and people accessing and making use of LMIM's and LMA's books and records. My and Ms Muller's intention in all

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- of those matters has been to protect whatever confidence or legal professional privilege may exist in those documents on behalf of all Funds, while attempting to minimise the expense to the Funds relating thereto;
- (f) communicating and closing the various 'satellite offices' which LMIM maintained for marketing purposes around the world, for the purpose of reducing the operational expenses ultimately to be borne by the Funds; and
 - (g) dealing with enquiries from investor advisors, who may have promoted investment in several of the Funds for many different unit holders.

39. Again, because of the nature of Category 2, I cannot say that any of this work was directly referable to a particular asset or liability of one of the Funds.

40. However, I believe that the work in Category 2 is:-

- (a) incidental to LMIM's role as a responsible entity and therefore connected with all of the Funds;
- (b) not properly or fairly chargeable to one Fund in particular but clearly referable to the Funds (as distinct from LMIM, the corporate entity); or
- (c) connected with the management of the business of LMIM and LMA, as professional corporate trustees.

41. For those reasons, I seek orders from this Court that my and Ms Muller's remuneration in that respect be borne by the Funds in such proportion as is found to be equitable.

Various Fee Types

42. Mr Whyte's Affidavit makes reference to several different types of 'fees' which appear to have been paid from the assets of the FMIF. Having reviewed my

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Second Affidavit and Mr Whyte's Affidavit, I can provide further detail about the interplay between loan management fees, resources fees and management fees, as raised by Mr Whyte.



43. Those fees are:-

- (a) 'management fees', which were historically charged by LMIM to the FMIF pursuant to the constitution of the FMIF and then paid to LMA pursuant to the historical services agreement existing between LMA and LMIM referred to in paragraph 16 of my First Affidavit;
- (b) 'loan management fees', which were charged by LMA to PTAL as custodian (and to be paid out of the Funds but ultimately borne by borrowers as the fees were on charged to a borrower's loan account as an allowable expense) pursuant to loan management services agreements (which were effectively controllership agreements between PTAL, as mortgagee in possession, and LMA as the appointed controller in respect of specific loans/assets); and
- (c) the 'resources fee', charged pursuant to the LMA Services Agreement Ms Muller and I caused LMIM and LMA to enter into almost immediately following our appointment as administrators. That fee was ultimately applied only to cover actual operating costs of LMA, though in the period immediately following my and Ms Muller's appointment, it was described in some ledgers as a continuation of the management fee. I have explained the circumstances of those transactions at paragraphs 34 to 43 of my Second Affidavit.

Resources Fee

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44. The Resources Fee was calculated and charged pursuant to clause 4.2 of the LMA Services Agreement. Clause 4.2 provided:-

"The Resources Fee in respect of each Trust and the RE in its personal capacity will be either:-

- (a) Subject to review by the Administrators, the management fee payable to RE under the relevant Constitution for the relevant period less any amount of the management fee that RE reasonably considers should be withheld to pay, or provide for, other actual or contingent liabilities it has incurred or will incur in its personal capacity; or*
- (b) Any other fixed or variable fee agreed by the parties from time to time."*

45. The Functions to be performed by LMA were defined in Schedule 1 to the LMA Services Agreement.

46. The Resources to be provided by LMA were defined to mean Staff and Other Resources, which terms themselves were respectively defined to mean:-

- (a) staff employed by or engaged as a consultant to LMA or its related bodies corporate who are provided as to all or part of their time to RE to perform the Functions under this agreement; and
- (b) premises, computer systems and other equipment software, know-how and other tangible and intangible property owned, leased, licensed or otherwise procured by LMA or a related body corporate or associate of LMA and used by the Staff to assist RE to perform the Functions.

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47. I confirm that no part of the Resources Fee charged pursuant to the LMA Services Agreement is remuneration for Ms Muller and I or FTI Consulting (bearing in mind the corrections which appear at paragraphs 44 to 46 of my Second Affidavit).

48. Upon my and Ms Muller's appointment, LMA had practically no available cash reserves of its own. Accordingly, we caused LMIM to loan its own funds to LMA in order to meet the initial operating costs (staff wages, utilities, rent etc.). This was recorded as a loan in the relevant books of account. Subsequently when monies were received from the Funds by LMIM in respect of the Resources Fee payable to LMA, those funds could be applied by LMIM in discharge of the loan account between LMIM and LMA such that there was no actual payment from LMIM to LMA (nor any corresponding receipt or payment recorded in the relevant statutory returns in the administration of each company). This is the explanation for the matters raised in Tucker and Cowen's letter dated 4 March, 2016 but did not occur in respect of each and every amount received from a Fund, which transactions are explained in more detail below.

49. At [32] is an extract from the records maintained by my staff in the administration and liquidation of LMIM for the purpose of recording the transactions which occurred in respect of that loan.

50. At [33] to [41] are the invoices issued by LMA to LMIM for the Resources Fee and from LMIM to the FMIF for its proportion of the Resources Fee. Those are the same invoices which appear at pages 474 to 486 of the exhibits to Mr Whyte's Affidavit.

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51. Those invoices are for the 'hard' operational costs of LMA, which are detailed in the schedule behind each invoice, as follows:-


- (a) invoice number '8973Inv002' from LMA to LMIM for the Resources Fee for the period from 19 March, 2013 to 30 June, 2013, being \$2,248,161.11 (incl. GST), which appears at [33] to [35];
- (b) invoice number '8974inv1' from LMIM to the FMIF, for its proportional share of the Resources Fee and operational costs for the period from 19 March, 2013 to 30 June, 2013, being \$1,518,511.41 (incl. GST), which appears at [36] to [37]. After accounting for the interim management fees drawn in accordance with the practice set out in paragraphs 34 to 43 of my Second Affidavit, there was a balance due and payable of \$414,915.00 (incl. GST);
- (c) invoice number '8973Inv006' from LMA to LMIM for the Resources Fee for the period from 1 July, 2013 to 26 July, 2013, being \$405,095.49 (incl. GST), which appears at [38] to [39];
- (d) invoice number '8974inv5' from LMIM to the FMIF, for its proportional share of the Resources Fee and operational costs for the period from 1 July, 2013 to 26 July, 2013, being \$354,673.42 (incl. GST), which appears at [40] to [41].

52. At [42] is an extract from the records maintained by my staff in the administration of LMA for the purpose of recording the transactions which occurred in respect of the resources fee, explaining which amounts were paid and which amounts were credited against the loan from LMIM referred to in paragraph 48 herein.

Loan Management Fee

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53. I refer to the invoices which appear at pages 370, 396, 399, 403, 405 and 408 of Mr Whyte's Affidavit. Those invoices relate to the practice of charging loan management fees which was in place at the time of my appointment.

54. I have caused to be located from the books and records of LMIM and LMA documents which provide an example of how those fees were calculated and charged.

55. At [43] to [68] is an agreement, entitled 'Management Services Agreement' between The Trust Company (PTAL) Limited (the FMIF's custodian trustee, "PTAL"), LMIM and LMA, which is undated. The 'Borrower' for that agreement is Brambleton Pty Ltd ACN 118 835 742 ("**Brambleton**").

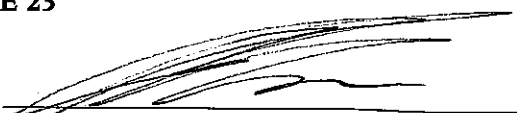
56. Pursuant to that agreement, PTAL appointed LMA to provide, what is described in Schedule 2 of the agreement as, services relating to general administration, development management, and marketing and sales. From the description of those services in the agreement, they appear to be largely analogous to the services required to manage a defaulting loan (akin to a controllership).

57. By clause 7.1 and schedule 1, for general administration services, LMA was entitled to charge to PTAL as custodian (and to be paid out of the Fund) a fee based on hourly rates for its staff. Ultimately, LMIM as responsible entity of a Fund would then 'on-charge' the loan management fee to a borrower's loan account as an expense through the entry of a debit to the loan account for such fees (usually on a monthly basis).

58. This charging of borrowers for this expense was provided for in the standard Fund loan agreements and thus such costs were ultimately met by the

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specific borrower in respect of whose asset LMA had been appointed controller. At [69] to [92] is a copy of the agreement between LMIM, PTAL and Brambleton by which PTAL agreed to loan monies to Brambleton.

59. At [93] is a spreadsheet which appears to contain a list of each borrower from the FMIF in respect of which there is a management services agreement. The spreadsheet contains hourly rates for particular LMA staff members and the hours each LMA staff member worked in relation to each borrower (with an associated charge).

60. The spreadsheet records charges, calculated at the applicable hourly rates, for Brambleton for the month of June, 2013 as \$6,848.75. For all FMIF borrowers, the total amount for June, 2013 is \$203,705.08.

61. The loan management fee for each borrower was subsequently charged to each borrower's loan account by LMIM as responsible entity for, in this case, the FMIF. At [94] to [96] is a copy of an extract from the loan statement for Brambleton for the relevant period.

62. At [98] is an invoice from LMA to PTAL for loan management fees for June, 2013.

63. Ms Muller and I took legal advice as to the effect of the administration on the loan management agreements. Having considered that advice (the privilege in which I do not intend to waive), it was decided that those agreements should be maintained in order to continue to provide LMA with its own income stream.

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Signed



Solicitor/Barrister/Justice of the Peace

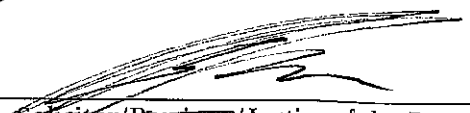
64. During the course of the appointment, LMA issued PTAL as custodian for the FMIF with the following invoices for loan management fees:-

- (a) for the months of March, April and May, 2013, invoice number '8973Inv003' (which appears at [97]) in the amount of \$714,056.99 (excl. GST). Of that amount, the sum of \$509,747.84 (excl. GST) was 'offset' against LMIM (acting by its administrators) because I became aware that the FMIF had prepaid, or advanced, management fees to LMA in that amount, pursuant to the historical services agreement prior to my and Ms Muller's appointment. In so doing, Ms Muller and I acted on legal advice, the privilege in which I do not intend to waive. The balance of \$224,740.07 (inclusive of GST) was paid from the assets of the FMIF to LMIM. By way of a book entry, those funds were used to partially repay the loan from LMIM to LMA referred to in paragraph 48 herein, such that no actual cash was paid to LMA. That invoice replaced the earlier invoices created by LMA staff, including those which appear at pages 352 and 353 of Mr Whyte's Affidavit;
- (b) for the month of June, 2013, invoice number '8973Inv004' being the same invoice referred to in paragraph 62 herein, which appears at [98]. That invoice resulted in the payment of the sum of \$214,426.40 from the FMIF to LMA;
- (c) for the month of July, 2013, invoice number '8973Inv005', which appears at [99], for the amount of \$252,310.87 (inclusive of GST). That invoice remains unpaid.

65. The 'offset' referred to in subparagraph 64(a) herein is not the same offset described in paragraph 48 herein.

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Solicitor/Barrister/Justice of the Peace

66. At [100] to [116] is a copy of the ledger maintained by my staff for receipts into and payments out of LMA. Based on that ledger, I believe that the sum of \$214,426.50 (the amount referred to in subparagraph 64(b) herein) was applied to meet the operating costs and expenses of LMA:-

- (a) which were not limited to the costs covered by the Resources Fee; and
- (b) in respect of which there was a shortfall for the Resources Fee charged to MPF because of the settlement referred to in paragraph 19 of my Second Affidavit.

67. At [117] is an extract from the records maintained by my staff in the administration of LMA for the purpose of recording the transactions which occurred in respect of the loan management fees.

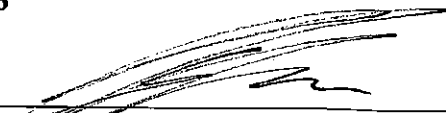
Miscellaneous Matters

68. In my experience as a liquidator, the administration of LMIM and LMA and the liquidation of LMIM has been a difficult and complex one. The complexity is evident from (at least):-

- (a) the significant number and value of assets within the portfolio of the Funds and LMIM;
- (b) the nature of those assets as being principally securities with very few direct property holdings;
- (c) the number of investors (in excess of 5,000) and their location around Australia and the world;
- (d) LMIM's role as responsible entity of seven registered managed investment schemes;
- (e) the difficult legal questions which have arisen in relation to Mr Whyte's appointment and LMA's practice of intermingling its books and records.

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Solicitor/Barrister/Justice of the Peace

69. At [118] to [148] is a copy of the body of the affidavit sworn by Mr Whyte on 2 May, 2014 and selected extracts from the exhibits thereto in support of his application for remuneration filed on 2 May, 2014 in proceeding number 3383 of 2013 in this Court.

70. For the brief period following the appointment of McGrath Nicol and prior to Mr Whyte's appointment, that is from 11 July, 2013 to 8 August, 2013, I believe it would be fair to categorise McGrath Nicol's appointment as passive, at least insofar as it related to the management of the FMIF (as opposed to the realisation of the assets of the FMIF). McGrath Nicol did not seek to take over the operations of the FMIF.

71. This approach was specifically discussed and agreed upon by Deutsche Bank and the appointees at FTI Consulting and McGrath Nicol to ensure that a further layer of insolvency practitioner costs was not burdened upon the Funds.


72. While their appointment added a layer of complexity and additional work, it did not lessen or replace the role of LMIM and LMA as the entities obliged to manage and protect the assets of the FMIF.

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

SWORN by **JOHN RICHARD PARK** on **8** March, 2016 in the presence of:



Deponent



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

Sean Charles Russell
Solicitor

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**

Bound and marked JRP-3 are the exhibits to the Affidavit of **JOHN RICHARD PARK** sworn 8 March, 2016:



Deponent



Solicitor/Barrister/Justice of the Peace

Sean Charles Russell
Solicitor

CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicants

Form 47 Rule 435

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SUPREME COURT OF QUEENSLAND

**REGISTRY: Brisbane
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Filed on behalf of the Applicants

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