SUPREME COURT OF QUEENSLAND

REGISTRY BRISBANE
NUMBER BS3508/15

First Applicant: **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**

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- **"Pay the expenses and liabilities of LMIM as far as they relate to the FMIF as determined by proofs of debt and other authorised methods in accordance with sections 477(1)(b), 477(1)(d), 506(3) and 562 of the Act and clause 16.7(b) and 18.1 of the Constitution"** 24
- **"to recover those assets of the FMIF which are available only to the Liquidators because of part 5.7B of the Act"** 26
- **"to manage and deal with members, units and the capital of the FMIF as required by the Constitution, in particular, as required by clauses 3.6, 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1, as well as parts 9, 10, 12, 22 and 28 of the Constitution"** 26
- **"to determine and report upon the financial status of the FMIF as required by clauses 16.10, 27.1 and 27.4, as well as parts 11, 12 and 14 of the Constitution"** 29

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Summary

1. The present application is directed to clarifying who is charged with particular roles in relation to the winding up of the FMIF having regard to the terms of the Court Order of 21 August 2013 ("the Order"). It is not a question of who is appropriate to the wind up the Fund.

2. The Applicants seem to proceed on the basis of a misconception. It is not contended by the Respondent, Mr Whyte, that he is entitled under the Order to carry out all of the statutory functions of the liquidators and the trustee obligations of the second applicant or that he conduct the winding up as though he were conducting the winding up of the company.

3. Mr Whyte's understanding is that by virtue of the Order pursuant to s 601NF(1) and (2) which incorporates the powers of a receiver under s 420 of the Corporations Act, he is in substance and effect to conduct the winding up of the FMIF in accordance with its Constitution.

4. In the context of a winding up of the FMIF, the winding up of the FMIF includes the gathering in and realizing of assets, payment of liabilities and distribution to members pursuant to Clause 16.7 of FMIF's Constitution. To the extent that the liquidators seek orders that they have a primary role in terms of the winding up of the Fund such as the payment of liabilities and distributions to members that would appear to be contrary to the Order. The Order on its proper construction does not limit Mr Whyte's role to the gathering in and realization of assets.

5. The basis upon which directions are sought that the liquidators of LMIM undertake some tasks as opposed to directions that the responsible entity of the FMIF do so are not readily identified.

6. The direction that is sought by the Liquidators in terms of paragraph 1 of Schedule 1 appears to seek to, in effect, obtain orders for the winding up of the Fund which would alter the rights of third parties in terms of s 477 (1)(b) and (d) and s 506 (3) of the Corporations Act. Such powers cannot be granted pursuant to s 601NF (2): *Re Stacks Managed Investment Ltd*[1]. Nor is it apparent that such powers would

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1 (2005) 219 ALR 532 at [52] and [55].

generally apply since LMIM acted in its own capacity as well as in a capacity as responsible entity or Trustee of other funds.

7. Mr Whyte does not seek to prevent the Applicants as liquidators or the responsible entity from properly discharging any obligations insofar as they arise notwithstanding the winding up of the FMIF. However in terms of the additional matters which the Applicants contend are properly part of their functions or the function of the responsible entity, some are matters which form part of the winding up for which Mr Whyte understands he is primarily responsible. Other matters do not appear to arise in the context of the winding up or are matters which don't appear to be necessary for the liquidators or the LMIM as responsible entity to carry out their ongoing roles or are prematurely raised.

8. In terms of the audit of accounts, which may be required pursuant to the *Corporations Act*, Mr Whyte has sought relief from ASIC for such an audit, although an audit must be carried out at the completion of the winding up of the Fund. The Applicants could if necessary seek similar relief.

Background

9. LM Investment Management Limited (in liquidation) ("**LMIM**") was, and it still is, the responsible entity for the LM First Mortgage Income Fund ARSN 089 343 288 ("**the FMIF**"). LMIM has been in liquidation since 1 August 2013 with John Park and Ginette Muller of FTI Consulting ("**FTI**") as its liquidators. LMIM and its liquidators apply for directions as to how the FMIF is to be wound up and in particular, directions pursuant to ss.511(1) and 601NF(2) *Corporations Act* 2001 ("the **Act**") as to whether LMIM and its liquidators are responsible for discharging the functions, duties and responsibilities set out in Schedules 1 and 2 to its amended application. It also seeks an order that the liquidators' remuneration, costs and expenses of discharging such functions, duties and responsibilities (including in respect of this application) be paid from the scheme property of the FMIF.

10. The respondent to the application ("**Mr Whyte**") is the person who was appointed pursuant to s 601NF(1) to ensure that the FMIF is wound up in accordance with its

constitution and as a Court-appointed Receiver pursuant to s 601NF(2). Mr Whyte holds office under those dual appointments ordered by the Court[2].

11. The FMIF is a "first mortgage fund". In short, LMIM, as Responsible Entity for the FMIF, was required to invest the pooled capital subscribed by the members of the FMIF in "Mortgage Investments" to be held on trust for the benefit of the members of the FMIF. Each such investment was to be a loan to a third party to acquire real property on the security of a registered mortgage.[3]

12. By March 2009 the FMIF was experiencing serious difficulties. It closed for new investments in about March 2009 and redemption of units in the FMIF was suspended in October 2009, other than redemptions allowed under hardship provisions and certain payments to feeder funds.[4] On 19 March 2013 John Park and Ginette Muller were appointed voluntary administrators of LMIM[5] and on 9 April 2013, ASIC suspended LMIM's Australian Financial Services Licence ("AFSL").[6] LMIM's AFSL continues to remain suspended (subject to such matters as are necessary for or incidental to the winding up of the FMIF) until 2 April 2017[7].

13. On 11 July 2013 Deutsche Bank AG, a secured creditor of the FMIF, appointed Joseph Hayes and Anthony Connelly of McGrathNicol as receivers and managers of the assets and undertakings of the FMIF.[8] On 1 August 2013 Mr Park and Ms Muller were appointed Liquidators of LMIM.

14. On 8 August 2013[9], pursuant to s. 601ND of the Act, Dalton J directed LMIM to wind up the FMIF and Mr Whyte was appointed as the person responsible for ensuring that it is wound up in accordance with its constitution and as receiver of the property of the FMIF.[10]

15. Accordingly, by orders made by Dalton J, Mr Whyte was appointed:

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[2] DW-2 Affidavit of David Whyte filed 7 November 2014 in BS 3383/13 (Court document number 225)
[3] Affidavit of David Whyte filed 7 November 2014, para 18 in BS 3383/13 (Court document number 225)
[4] Affidavit of David Whyte filed 7 November 2014, para 21 in BS 3383/13 (Court document number 225)
[5] Affidavit of David Whyte filed 7 November 2014, para 22 in BS 3383/13 (Court document number 225)
[6] Affidavit of David Whyte filed 7 November 2014, para 23 in BS 3383/13 (Court document number 225)
[7] Affidavit of David Whyte filed 12 June 2015, para 4(f)
[8] Affidavit of David Whyte filed 7 November 2014, para 24 in BS 3383/13 (Court document number 225)
[9] The orders pronounced by Her Honour on 8 August 2013 were later embodied, with consequential orders which were the subject of further submissions, in the Order dated 21 August 2013
[10] Affidavit of David Whyte sworn 7 November 2014, paras 25 and 26 ex DW-1 p 31, DW-2 in BS 3383/13

(a) pursuant to s.601NF(2) of the Act, as the receiver of the property of the FMIF; and

(b) pursuant to s.601NF(1) of the Act, to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution.

16. Pursuant to the Constitution of FIMF the winding up of the FIMF occurs by converting to money all of the assets of the FMIF, deducting all proper costs and then distributing the moneys to each member of the FMIF in proportion to the member's interest in the FMIF.[11]

Structure of these submissions

17. These submissions comprise two parts.

18. First, submissions are developed regarding the construction of Dalton J's orders.

19. Secondly, submissions are made as to the specific powers and duties raised in the two schedules to the amended application.

20. Where necessary, in the context of the two parts identified above, these submissions respond to submissions made in the applicants' "Outline of submissions" dated 8 July 2015 ("Applicant's outline"). In this regard, the Respondent notes the Applicant's outline does not address all matters which are the subject of its amended originating application[12]. These submissions were prepared on the footing that the matters which are raised in the applicants' written submissions set out the extent of the contentions which the applicants seek to advance regarding the construction of the orders and the relevant provisions of the Act.

Construction of the orders of Dalton J

<u>Mr Whyte's appointment</u>

21. Paragraph 2 of the order of Dalton J of 21 August 2013 provides as follows:

> *Pursuant to section 601NF(1) of the [Corporations Act 2001], 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").*

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[11] See subclause 16.7(b) of the Replacement Constitution of the FMIF, at p.118 of ex. DW-5 to the Affidavit of David Whyte filed 7 November 2014 in BS 3383/13 (Court document number 225)

[12] Affidavit of David Schwarz filed 30 June 2015

22. Paragraph 3 of the order provides that Mr Whyte is to exercise express powers pursuant to s.601NF(2) the Act to:

> *(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.*

23. In addition Mr Whyte was appointed receiver of the property pursuant to s.601NF(2). Pursuant to paragraph 6 of the order, Mr Whyte was expressly given the powers set out in s.420 of the Act in respect of the property for which he was appointed receiver.

24. Paragraph 7 of the order further provides that "[w]ithout derogating 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 the 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.*

25. Paragraph 7 was clearly included to address the fact that FMIF is not a legal entity and it is LMIM as Trustee which would hold the title or legal rights to property and be the relevant party for the purpose of bringing proceedings. While sub-paragraph (a) relates to Mr Whyte's role in the realisation of the property of the FMIF and ensures he can take the appropriate steps unconstrained by the fact that LMIM is the legal entity which potentially holds or controls the legal title to the property,

paragraph 7(b), however is in more general terms enabling Mr Whyte to bring any legal proceedings necessary for the winding up of the FMIF in accordance with clause 16 of its constitution, which is consistent with Mr Whyte having a primary role in terms of the winding up.

The context of the appointment

26. The context of the Order by which Mr Whyte was appointed is of some significance. The application itself refers to some extent to the context in which the appointment was made. Dalton J's reasons for judgment also provide some assistance[13].

27. An originating application was filed by Trilogy to be appointed the temporary responsible entity. That was found to be incompetent on the basis that LMIM was still capable of being the responsible entity notwithstanding the appointment of administrators and as such the statutory provisions for such an appointment were not satisfied. Her Honour considered as a matter of discretion that she would have refused such an application but felt that Trilogy's concerns would be allayed by her appointment of someone independent to control the FMIF[14].

28. Further applications were made by ASIC that LMIM be directed to wind up the FMIF and independent liquidators be appointed to take responsibility for the winding up and those liquidators be appointed as receivers. That was opposed by FTI as liquidators of LMIM. Mr Shotton also applied and ultimately sought the same relief as ASIC in terms of the appointment of the receiver.

29. The wide powers given to Mr Whyte pursuant to the terms of the Order are consistent with the reasons of Dalton J at paragraph 121 that Mr Whyte "should in substance and effect conduct the winding up of the fund":

> *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. Trilogy said I ought not appoint a receiver*

[13] It is permissible to have regard to reasons supporting an order particularly in terms of establishing the context of the order made: *Australian Energy Limited v Lennard Oil NL (No 2)* [1988] 2 Qd R 230 at 232 and 234; *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* (2008) 2 Qd R 323 at [34]-[35]

[14] At [27]

> *because to do so would damage the way the fund was perceived by creditors and by those who might potentially buy its assets. In circumstances where Deutsch Bank has already been appointed as receiver and where the responsible entity of the fund is itself in administration, and likely to be in liquidation, I am not deterred by this consideration. The fact of the matter is that the fund has reached a point where it must be wound up. I will appoint Mr Whyte receiver of the property of the fund under s 601NF(2) of the Act.* (emphasis added)

30. Her Honour at paragraph 117 considered that in a winding up where conflicts may arise there was no assurance that the current administrators would act properly in the interests of members of the FMIF in identifying those issues or dealing with them. Dalton J considered that made it necessary that someone independent have charge of winding up FMIF pursuant to s 601NF(1). Although some of her Honour's findings were found to be in error by the Court of Appeal, the appeal from her Honour's orders was dismissed and her Honour's orders upheld: [2014] QCA 136. The relevant findings are at paragraphs 86 to 96 of her Honour's reasons. Although LMIM brought an appeal against Dalton J's order pursuant to s 601NF(1) of the Act appointing Mr Whyte, no argument was directed by LMIM to the appropriateness of the orders made under s 601NF(2): *LM Investment Management Limited (in liq) v Bruce & Ors* (2014) 102 ACSR 481 at [7] per Fraser JA.

31. In making the Orders her Honour relied upon the decision in *Equititrust Ltd (ACN 061 383 944) v Members of the Equititrust Income Fund and anor*[15] ("**Equitrust**").

32. In *Equititrust* Applegarth J said appointment of a receiver to a managed investment scheme was appropriate for the following reasons at 816-817:

> *... 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....*
>
> ***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.***
>
> *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).*
>
> *[emphasis added]*

[15] (2011) 288 ALR 800

33. In analysing the power to appoint a receiver Applegarth J made a number of salient points in terms of the operation of s 601NF and in particular whether the power extended to the appointment of a receiver:

(a) 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 s 601NF(2) may arise for consideration in a wide variety of circumstances. For instance, s 601NF(1) contemplates situations such as where a responsible entity would not exist or would not be capable of winding up the registered scheme under the oversight of a person appointed pursuant to s 601NF[16];

(b) that 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[17];

(c) 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 other orders made under subsection (2). On the basis of relevant authority as to what was included in "winding up" 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), however there is doubt that it extends that far[18];

(d) s 601 NF(2) contemplates the making of orders, not simply directions and the orders are not confined to directions about the winding up in accordance with the Constitution[19];

(e) while s 601NF does not specify all of the circumstances in which orders will be made, it contemplates circumstances where the provisions in the

[16] at [37]
[17] at [37]
[18] at [38] and [51]
[19] (2011) 87 ACSR 636 at [40]

Scheme's institution are inadequate or impracticable. That indicates that the remedial power of the section is wider than merely giving administrative directions[20]. His Honour found that White J in *Stacks* did not intend to limit the scope of the section in that manner[21];

(f) where the scheme is a trust what is envisaged by the winding up of the scheme is the realisation of its property, the payment by the responsible entity of liabilities incurred on behalf of the scheme or the retention of funds with which to meet its liabilities, the ascertainment of members' entitlements, and the distribution of the trust assets to the members in accordance with their entitlements[22];

(g) s 601 NF did not provide a power to give directions in s 601NF(2) in a wide way as contended by the Plaintiff in *Stacks* to in effect permit the court, by order, to impose a new legislative regime on the winding up of a particular scheme and thereby affect the rights of and impose duties on third parties[23];

(h) s 601NF(2) gives the court power by order to give direction that the person appointed pursuant to s 601NF(1) act as receiver of the property of the scheme[24];

(i) in that case, his Honour considered that the orderly conduct of the winding up of each fund would 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 s 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[25].

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[20] (2011) 87 ACSR 636 at [40]
[21] (2011) 87 ACSR 636 at [47]
[22] at [43]
[23] at [45]
[24] at [52]
[25] at [72]

34. His Honour also rejected the argument that appointing a receiver would cut across the legislative framework governing the winding up of a registered scheme[26].

35. It is clear from his Honour's reasons and indeed the reasons of Dalton J that the order appointing a party pursuant to s 601NF to ensure the scheme be wound up in accordance with its constitution and as receiver was to empower them to undertake the winding up of the scheme, which consists not only of the gathering in of assets but the payment of liabilities and the distribution to members.

36. It is contended in paragraph 3 of the applicants' written submissions that the respondent "takes a very expansive view of his powers and responsibilities, such that he asserts he is entitled (and empowered) to carry out all of the statutory functions of the liquidators and the trustee obligations of the second applicant" and at paragraph 2 that the respondent would "conduct the winding up of the FMIF as though he were conducting the winding up of a company." A similar submission is made at paragraph 14. No such contention has been or is made. On the basis of the terms of the Court order and the reasons adopted by the Court, Mr Whyte understands that his role is in substance and effect to carry out the winding up of the FMIF consistent with the terms of the constitution. The respondent does not contend and has not contended that his powers are as extensive as stated in those paragraphs of the submissions. There is a distinction, which those paragraphs miss, between the FMIF and the company (LMIM) – Mr Whyte being appointed in respect of the former.

37. Another difference apparent from the written submissions is that it is the applicants' contention that "[t]he matters that lead to Dalton J appointing Mr Whyte as received on the basis of potential conflicts (as recognised by Fraser JA at paragraph [132] of the appeal decision) extends only to the collecting in of assets of the FMIF. Once those assets have been collected in, there remains no conflict." The respondent can find nothing in either Dalton J's reasons or the reasons of the Court of Appeal that draw that distinction, in terms of avoiding the conflict which was identified. The question of potential conflicts was one of the matters which led the Court to consider the order made was a necessary one. There is no limitation evident from the terms of the Order or the reasons of Dalton J or the Court of Appeal that Mr Whyte's appointment was only to carry out that part of the winding

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[26] (2011) 288 ALR 800 at [75]

up which consisted of the gathering in of assets of the scheme. Such a limitation appears to be in direct contrast to what was contemplated by Applegarth J in *Equititrust* and Dalton J in the present case.

Analysis

38. To the extent that there is scope for argument that there is ambiguity as to the roles to be undertaken by Mr Whyte as opposed to FTI as the liquidators of LMIM as responsible entity of FMIF, that arises by paragraph 1 of the order which provides for LMIM as the responsible entity to wind up the FMIF.

39. However, paragraph 1 of the order was "subject to the orders below". Thus it is plain that the subsequent orders were intended to limit the operation of paragraph 1 insofar as it directed LMIM to wind up the FMIF.

40. Paragraph 1 accords with the wording of the Act in s 601ND which provides for the Court by order to direct the responsible entity of a registered scheme[27] to wind up the scheme, as well as acknowledging the jurisdictional limitations upon ordering another body to be appointed as temporary entity, as was the case in the present case[28]. The limitations of the Order in paragraph 1 accord with the fact that the Act contemplates further orders may be made under s 601NF which circumscribe the order made pursuant to s 601ND and the operation of s 601NE.

41. Section 601NF acknowledges that a responsible entity may not be able to discharge that role. It is true that s 601 NF does not provide for orders it considers appropriate for the winding up of the scheme as is found in the case of an unregistered scheme in s 601EE. The Court specifically made orders to avoid the potential confusion of roles that may arise as a result of an order under s 601ND and an appointment under s 601NF(1) by the appointment of Mr Whyte as receiver[29]. In particular her Honour was concerned to avoid the distinct potential for two sets of insolvency practitioners to charge a distressed fund.

42. In appointing Mr Whyte as receiver, her Honour provided him with powers pursuant to s 420 of the Act but given those powers under the Act are framed in terms of a receiver of a corporation, the intent of the order is clearly to empower

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[27] Additional provisions such as s 601NB, s 601NC and s 601NE similarly make it clear that the responsible entity is the appropriate entity to wind up the scheme which was accepted by Dalton J at [44]
[28] [2013] QSC 192 at [19] and [20]
[29] Reasons at [121]

the receiver to act in relation to the property of the FMIF exercising the same powers as he or she could in relation to the property of the corporation. That was the view taken in *Whyte v McLuskie & Ors* [2015] QSC 132 ("**McLuskie**") per Burns J at [28] where his Honour said "No limitation in the exercise of those powers was expressed, or may sensibly be inferred."

43. The powers in paragraph 7 of the orders significantly broaden the powers that may be exercised by Mr Whyte. Those powers are not limited to the gathering in of assets as is made clear by the terms of paragraph 7(b) of the Orders in providing for the defence of proceedings.

44. On the proper construction of the Orders while LMIM as responsible entity continues to exist and it remains the trustee of the FMIF, its role in terms of the winding up is limited by the Orders made by the Court pursuant to s 601 NF. Mr Whyte's role as the receiver pertains to the property of the FMIF and in the context of a winding up, the realisation and distribution of property is the pivotal role in order to be able to ensure the winding up is effected. That is the role to which he is appointed pursuant to his appointment under s 601NF(1). In the context of the winding up of the FMIF which is to be carried out by Mr Whyte LMIM's role is necessarily limited. For instance, it would require LMIM as responsible entity to maintain the Australian Financial Services Licence which remains suspended during the winding up[30].

45. The orders of Dalton J are clear in that rather than assigning particular tasks to Mr Whyte or preserving any active responsibility for the assets of the FMIF in the hands of LIMIM, they provide not only that Mr Whyte is to "take responsibility" for the winding up of the FMIF but that he act as receiver of the property.

46. The Court has made orders appointing Mr Whyte as receiver in order to ensure he could in substance and effect carry out the winding up of the FMIF. As Megarry J in *Attorney General v Shonfield* [1980] 1 WLR 1182 at 1187, referring to the appointment of a receiver as an equitable remedy, stated:

> *The remedy is one to be moulded to the needs of the situation; within proper limits, a receiver may be given such powers as the court considers to be appropriate to the particular case.*

47. The appointment of Mr Whyte as receiver was to make it clear the relevant party is to deal with the property of the FMIF: *Equititrust* at 811. Such orders may be made

[30] Affidavit of David Whyte filed 12 June 2015 paragraph 4(f) (Court document number 11).

in the case of liquidators in the case of trust assets where there is uncertainty as to the ability of the liquidator of a corporate trustee to deal with such assets given the company does not hold trust assets beneficially[31]. In *Burness (as liquidator of Index Options Australia (in liq)) v Blousoff* (2006) 59 ACSR 716 at [18]-[20] Whelan J in appointing the liquidators receivers of trust assets stated:

> *[18] Where a trustee or former trustee is in liquidation it may still be appropriate for the liquidator to continue to administer the trust assets, through the administration of the corporate trustee if the company remains the trustee, or as receiver of the trust assets. There is always the real potential for conflicts of duty where a liquidator does perform such a dual function. This may mean that a liquidator acting in that dual role should seek directions before taking a particular course or if a significant conflict arises in fact, for example, over a matter such as his own fees, and that he will be replaced as receiver if he does not do so.*
>
> *[19] In the particular circumstances here the purported new trustee, Valmann, does not have and does not seek control of the assets. If it were to achieve control there are grounds for serious concern that they would be jeopardised, as the assets would again fall under the stewardship of Mr Belousoff.*
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> *[20] In my view the existing situation is unsatisfactory. The liquidator may in a sense have control of the assets, as counsel for respondents submitted, but his entitlement to administer them is controversial. In circumstances where the secured creditors are moving to realise their securities, this position is most unsatisfactory. It is necessary that there be someone whose authority to administer, and if necessary deal with, the assets is clear. In the circumstances that person's authority should include the power to sell the assets if he considers it appropriate to do so. Subject to the observations I make below, it seems to me that this objective of ensuring there is a reliable person with authority to deal with the assets is best achieved if the liquidator is appointed receiver of the trust assets.*

48. LMIM as responsible entity continues to be the trustee of the FMIF as recognised by s 601FC, however the absence of control of the property is significant.

49. By making the dual appointment the Court indicated that the appointee has the primary role in relation to winding up of the scheme and of course in dealing with the property, subject to the interests of the Deutsche Bank. That does not mean that LMIM has no role but it is one that is necessarily limited.

Relevance of 21 August exchange

50. The Applicants attach significance to the exchange before her Honour on 21 August in making the final order.

51. The transcript relied upon by the Applicant does not inform in any material way the meaning of the Order in terms of the present application for the following reasons:

    (a) while further orders were sought on behalf of ASIC and Mr Shotten described as more "intrusive orders" by Her Honour[32] her Honour recognised insofar as they related to the matters in clause 18.4 of the FMIF

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[31] *In the matter of Stansfield DIY Wealth Pty Limited (in liquidation)* [2014] NSWSC 1484 at [26] and [45]
[32] T 5-12

Constitution that there were matters which were incidental to the winding up and some which might overlap[33];

(b) ASIC indicated that it was applying for the additional order "out of an abundance of caution for the purpose of avoiding demarcation disputes"[34] and Mr Tucker pointed out the matters the subject of his proposed draft were incidental to the winding up[35];

(c) her Honour commented that the issue "might be starting at shadows"[36];

(d) the debate contemplated that there may be demarcation disputes in the future because of the ongoing role of the responsible entity and the terms of Mr Whyte's appointment. Notably the Applicant appeared to accept that under the Orders made, Mr Whyte was the relevant party to conduct the winding up of the FMIF[37].

52. In terms of the suggestion that Mr Whyte has not sought further clarification or directions from the Court, that possibility was raised on a number of occasions in August 2013 with the Applicants but no clear articulation of the Applicants' position was provided at that time.[38] Nothing further was raised by the Applicants following that exchange for over a year[39]. In terms of the present application the Applicants indicated they were seeking the directions as to *inter alia* its role as liquidators[40]. Further, as the Respondent indicated in relation to the exchange relevant to the present application, a number of the matters raised by the Applicants were hypothetical particularly in the context of the winding up of the FMIF[41]. Despite further clarity being sought, some of the matters the subject of the present application still do not appear to be raised as anything more than a possible exercise of power and are hypothetical.

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[33] T5-6/25-40
[34] T 5-11/16-19
[35] T5-11/10-32
[36] T5-12/45-46
[37] T5-5/44-45; T5-7/30-31
[38] Affidavit of David Whyte filed 12 June 2015 ex DW1 pp 251, 254, 260 and 268 (Court document number 13).
[39] See correspondence exhibited at paragraph 7 of Mr Park's affidavit.
[40] Affidavit of John Park sworn 21 April 2015 exhibit pages 116- 118.
[41] Affidavit of David Whyte filed 12 June 2015 ex DW1 pp 599 602 (Court document number 13).

The Statutory Regime

53. In paragraphs 17 - 21 of the Applicants' outline the Applicants seem to attach significance to the fact that:

(a) firstly, there is no statutory scheme in Part 5C.9 setting out the regime for the winding up of registered schemes;

(b) nowhere in the seven provisions referred to is there reference to any other person except the responsible entity carrying out the winding up process.

54. While the observations are true, they fail to take into account the significance of s601 NF which has been described together with s 601 EE (2) as providing the Court with a great deal of flexibility[42]. The above matters were the subject of detailed consideration by Applegarth J in *Equititrust* as set out above. After careful analysis his Honour while agreeing with White J in *Stacks* that the regime for winding up of companies could not simply be imported to the winding up of registered schemes in its totality[43] considered that s 601 NF did authorise him to make orders in the terms he did[44]. The combination of the appointment under s 601 NF(1) and as receiver pursuant to s 601 NF(2) empowered the appointee in substance and effect to wind up the fund.

55. The lack of a statutory scheme for winding up of registered schemes is again not a matter of significance in the interpretation of the Orders given that the Court was not seeking to impose such a regime. The winding up of a trust and a company is different[45]. As was noted by White J in *Stacks* at [46] one of the reasons for none of the winding up provisions of a corporation being made applicable to the winding up of a scheme was presumably because of the differences between winding up companies and winding up trusts or partnerships.

56. Further, McDougall J in *Re Rubicon Asset Management Ltd (admin apptd) and Others* (2009) 74 ACSR 346 at [51] pointed out, with respect correctly, that the contrast between the terms of s 601 EE and s 601 NF(2) reflects the fact that the power under the s 601 NF(2) is one exercised in the context of a registered scheme, where the scheme's constitution will provide for winding up; whereas the power in

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[42] *ASIC v Tasman Investment Management Ltd* (2006) 59 ACSR 113 at [19].
[43] at [45] and [50]
[44] at [52]
[45] *Mier & Johnson v F N Management Pty Ltd* [2005] QCA 408 at [20] per Keane JA

s 601EE is given in respect of unregistered schemes where there may be no such constitutional requirement.

The references to the responsible entity winding up the scheme in the statutory provisions and the Constitution

57. In terms of the construction of the Order and the powers given to Mr Whyte, the reference to the responsible entity being the relevant party to wind up the scheme in statutory provisions and the Constitution may identify matters which are distinct from the role of Mr Whyte to in substance and effect wind up the FMIF. The provision providing for LMIM to wind up was made subject to the orders that followed. That a party other than the responsible entity could be appointed under s 601 NF to in fact carry out the winding up of the scheme rather than the responsible entity was recognised by Applegarth J in *Equititrust* which was adopted by Dalton J. As such the reference to the responsible entity carrying out such roles is substantively overtaken by the Order made. All of the matters in terms of the winding up under the Constitution in clause 16 are nominated to be carried out by the responsible entity. The winding up provisions are contained in paragraphs 16.1 – 16.10[46]. There is no apparent basis in clause 16.7(a) to draw a line in terms of Mr Whyte's role.

58. It is difficult to understand why, as contended by the Applicants at paragraph 28, the lack of insolvency practitioners being appointed to *Equititrust* somehow impacts on the scope of the Order in the present case. The question in both cases was whether the Responsible Entity was the appropriate party to take responsibility for the winding up of the fund or it was necessary to appoint another party to take responsibility for ensuring the winding up.

59. Paragraphs 29 – 37 of the Applicants' outline appears to seek to revisit the Order made by her Honour which was upheld by the Court of Appeal. The Orders sought in *Stacks* and *Re Rubicon Asset Management Ltd (Administrators) Appointed* were different from the present case. As is evident from the analysis of Applegarth J neither case outlined the limit of the power contained in s 601 NF: *Equititrust* at 811.

60. In terms of the decision of White J in *Stacks*:

[46] Affidavit of David Whyte filed 12 June 2015 exhibit DW1 pages 369-374 (within Court document number 13)

(a) the Orders sought were specifically seeking to import the regime for the winding up of companies to the winding up of the scheme and to confer the powers of the liquidator;

(b) his Honour did not define the full ambit of powers involved;

(c) in terms of the position of the limits of the powers in terms of third parties and interference with their rights it was on the basis that s 601NF did not authorise the making of orders which would impact upon the rights *"which third parties would otherwise enjoy"*[47].That was accepted by McDougall J in *Re Rubicon* and Applegarth J in *Equititrust*. As the decision of Burns J in *McLuskie* demonstrates whether a matter falls within the scope of the power of the Order must be determined by reference to the powers under the Order not general statements made in particular contexts.

61. In *Re Rubicon* McDougall J:

(a) ordered the external administrators take responsibility for winding up of the fund (at [30]) noting that a potential conflict of interest that was evident would arise if recourse was had to the assets of the trustee for the costs and expenses of the winding up of the schemes which was avoided by the fact that such recourse had to be done by reference to the Courts (at [31]);

(b) considered that the power in s 601 NF (2) extended to directions about the how the costs and expenses of winding up of an insolvent registered scheme are to be paid : (at [55]-[56]) ;

(c) while his Honour agreed with White J in *Stacks* that s 601NF (2) did not authorise the grant of such wide powers as sought in that case (at [62]) he did not consider the full ambit of the power (at [56]).

62. The Applicants' contention at paragraph [34] is incorrect. Mr Whyte addresses the question of an interim dividend in response to the evidence of Mr Russell and his assertion that Mr Whyte said he would never make an interim dividend and Mr Park's indication that they wished to make such distributions under clauses 12 and 16 of the Constitution. Mr Whyte indicates in paragraph 29 that he is not able to make an interim distribution or to say with certainty that he expects to do so

[47] At [52]-[53]

given he has been given notice of two claims against the FMIF. As such there is no present possibility that such a distribution is to be made. Distributions are made to members as part of the winding up of the FMIF pursuant to clause 16.7 (c). Prior to being able to make such a distribution Mr Whyte would have to be able to ascertain the net proceeds available following the payment of liabilities. To the extent that he is responsible for ensuring the winding up of the FMIF and acts as receiver of the property, the distributions to members is part of the winding up. Distributions made in accordance with the terms of the Constitution do not alter or interfere with third party rights. To the extent that there was any doubt as to the proper distribution to be made under the Constitution to any member that is a matter upon which Mr Whyte could properly seek directions from this Honourable Court. Given Mr Whyte's role as receiver of the property of the FMIF (and the continuing appointment, for the time being, of the receivers and managers appointed by Deutsche Bank) it does not appear that the Applicants or the responsible entity continue to be able to exercise any power to make an interim dividend. In any event given the present state of the FMIF the question of an interim dividend will not be a possibility in the immediate future.

63. In terms of the reference to ascertaining the creditors of FMIF again, that is in the context of commenting that he has not yet paid the liabilities of LMIM as the responsible entity of the FMIF; that again is by reference to the winding up provisions of the Constitution, clause 16.7(b). No such payments have been made. However given that Mr Whyte is to ensure the winding up of the FMIF and acts as receiver of the property of the FMIF in that regard, the role of ascertaining liabilities payable from the scheme assets would be one which would appear to properly fall upon him. As was pointed out by White J in *Stacks* at [42]-[44], the winding up of a registered scheme which is a trust is quite different from a winding up of a company. It does not involve the prioritisation or adjudication of proofs of debt that could constitute some interference with a creditor's right. The fact that Mr Whyte would be dealing with creditors is specifically contemplated by the terms of paragraph 7(a) of the Order. To the extent that there is any doubt as to whether any liability is one which is liable to be indemnified out of trust assets or the situation arises where the assets of the FMIF are insufficient to meet liabilities of the FMIF, that would require recourse to the Court for further direction.

64. The ascertaining and payment of liabilities pursuant to clause 16.7 of the Constitution does not confer additional powers upon Mr Whyte to which third

parties would be made subject or interfere with the rights which third parties would enjoy. As stated above if there was a question as to whether a liability was properly payable out of the scheme assets or some dispute as to the extent of the indemnity it would properly be a matter upon which Mr Whyte would seek direction of this Honourable Court.

65. As is set out in the correspondence of Tucker and Cowen to Russells[48]:

(a) Mr Whyte does not contend that the liquidators may not call for and adjudicate upon proofs of debt submitted by creditors but that does not mean that the liquidators can automatically exercise those powers in respect of the property of FMIF;

(b) any claim by LMIM or by any creditor of LMIM rests upon LMIM's indemnity from the property of LMIM;

(c) the proof of debt procedure may not be the best means for dealing with claims of creditors where the payments concern payment from the assets of the FMIF, another mechanism being directions by the Court;

(d) it is premature to determine whether the calling for proofs of debt is the best way to ascertain such obligations given that there have only been a few claims notified to date to Mr Whyte.

66. The proposition that only LMIM could determine the validity of claims against LMIM and whether there is a corresponding right of indemnity out of the FMIF assets is not supported by the decision of White J in *Stacks* and was apparently rejected by Applegarth J and Dalton J in making the Orders in the terms that they did. Nor did White J apparently find that such matters could only be determined by the Company.

67. As to paragraph 36 of the Applicants' outline the potential conflict was one of the matters that led Dalton J to conclude it was necessary to appoint Mr Whyte under the terms of the Order. There is however no limitation in either the Order or reflected in her Honour's reasons that Mr Whyte's role extends only to the collecting in of the assets of the FMIF. As to the assertion that after the assets had

[48] Letter from Tucker and Cowen to Russells Lawyers dated 30 January 2015 (p 139 JRP-1 Affidavit of John Park)

been collected there remains no conflict that is presently a matter of speculation. At least in terms of the claims referred to at paragraphs 43 (a) and (b) of Mr Whyte's affidavit[49] there may be a source of potential conflict insofar as the claims relate to work carried out apparently not only for the FMIF but also LMIM in its own right and two feeder funds to the FMIF. There is also the claim by FTI itself for work apparently carried out for the FMIF[50].

68. In that regard, the Applicants in paragraph 4 of its Amended Originating Application seek an order that the Liquidators' remuneration, costs and expenses of discharging such functions, duties and responsibilities (including in respect of this application) shall be paid from the Scheme Property of the FMIF. The matter is not addressed in the Applicants' submissions, nor was it an Order sought from her Honour at the time of the original Order[51]. Liquidators may recover their reasonable and proper costs and expenses of administering the trust assets from the trust funds but only where there are insufficient non-trust assets in the liquidation to which in the ordinary course recourse should first be had, given that LMIM has other functions than merely acting as Trustee of the FMIF[52]. No evidence has been presented in that regard[53], save that Mr Whyte refers to (and exhibits) the publicly available liquidators' reports to ASIC concerning receipts and payments in the winding up of LMIM, which relevantly disclose an amount of cash at bank as at 31 January 2015[54]. Given such an Order may create an additional burden upon the FMIF, a possibility her Honour was seeking to avoid, no such order should be made without a proper basis being established for such an order. It is submitted in order to avoid any question of potential conflict any remuneration should be subject to Court approval.

69. In terms of Mr Whyte's role in winding up the FMIF it is submitted that pursuant to his Court appointed role he can determine the liabilities of the FMIF and whether they should be paid. To the extent required, arrangements could be put in place with the Applicants to ensure a proper discharge of LMIM in relation to such liabilities. The Applicants have provided no evidence as to why they are in a unique

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[49] Filed 12 June 2015
[50] Affidavit of David Whyte filed 12 June 2015 at paragraphs 45 -49
[51] s 601NF(2) would have enabled such a power to be made: *Re Rubicon*
[52] *In the matter of Stansfield DIY Wealth Pty Limited (in liquidation)* [2014] NSWSC 1484 at [7]
[53] An example of such circumstances is found in *Re Rivercity Motorway* (2014) 102 ACSR 185 at [60]-[69]
[54] Affidavit of David Whyte filed 12 June 2015 paragraph 25 and exhibit DW1 pages 193 – 247: at page 242 the amount of cash at bank is said to be $1,461,157.83

and better placed position to determine the liabilities of the FMIF as liquidators. In the context of the present application that is not a relevant question. LMIM has a number of functions outside of its role as trustee of the FMIF and the property of LMIM does not include property to which it is not entitled beneficially[55]. Given Mr Whyte has only been appointed in relation to the winding up of the FMIF and has built up knowledge of the workings of the FMIF, he is in a position to make such an assessment subject to any matter requiring further directions from the Court[56].

70. Mr Whyte's appointment does not preclude the Applicants' calling for proofs of debt for LMIM and if debts are liabilities for which a right of indemnity arises for payment from the FMIF claiming those amounts against the FMIF. The Applicants appear to assume that in the ascertainment and determination of the liabilities which should be paid out of scheme assets, Mr Whyte is under the Order, to have no role, even a supervisory one, notwithstanding he is, aside from the fact that he is the receiver of the property of the FMIF, appointed to ensure that the FMIF is wound up in accordance with its Constitution. That flies in the face of the Order made.

71. If it was determined that calling for proofs of debt was the most expedient way to ascertain liabilities to be paid in accordance with the Constitution, that could be done by the parties working co-operatively. To the extent that there was any doubt as to whether it was a liability which should be met out of scheme assets directions could be sought from the Court, it is submitted that the Applicants undertaking that process would not remove the possibility of such a direction being necessary. Insofar as the liquidators seek directions that they can pay expenses and liabilities pursuant to s 477(1)(b) and (d), and s 506(3) it is not apparent how the Court would be empowered to make such an order pursuant to s 601 FN given the decision of White J in *Re Stacks*. It is not apparent how the powers would otherwise be applicable otherwise given the fact that LMIM acted in both its own capacity and responsible entity of other feeder funds.

72. As to paragraph 39 Mr Whyte provides regular updates as to cash in hand and to be received and likely estimate of claims against LMIM as responsible entity of the FMIF to investors on a regular basis: DW- 1 to the Affidavit of Mr Whyte.

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[55] subject to any right of indemnity; *In the matter of Stansfield DIY Wealth Pty Limited (in liquidation)* [2014] NSWSC 1484 at [16]

[56] *In the matter of Stansfield DIY Wealth Pty Limited (in liquidation)* [2014] NSWSC 1484 at [29];

73. As to paragraph 40 the relevance of the matter raised to the present application is not apparent nor are any directions sought in this regard.

74. As to paragraph 41 this is discussed in more detail below. There is no evidence in relation to a number of those matters that they are matters which LMIM presently intends to exercise or as to the necessity to do so. As such they seek to have the Court provide an advisory opinion rather than arising out of any matter the subject of dispute for the reasons set out below. To the extent it requires LMIM to utilise scheme property it would appear that they have been overtaken by the Court Order.

75. As to paragraph 42- 43 the reporting to members Mr Whyte has been carrying out this task since his appointment providing regular updates to members of the FMIF[57]. As a receiver it is uncontroversial that he is obliged to maintain such accounting records as correctly record and explain all transactions entered into. In effecting the winding up of the FMIF it is convenient for him to report to the members consistent with his powers pursuant to s 420 of the Corporations Act. Given the FMIF is being wound up that is appropriate given he is carrying out the salient work in relation to the FMIF and has the relevant knowledge as a result of the carrying out of his role.

76. As to paragraph 44- 45:

(a) As stated above the Receiver must maintain relevant accounting records and has done so[58] which are available on the website;

(b) There is some doubt as to whether audits are required to be carried out pursuant to s301(1) of the Corporations Act where a scheme is being wound up[59], but in any event Mr Whyte is seeking a formal exemption from ASIC from any requirement to audit the FMIF. It would be open to the Applicants to seek similar relief[60];

(c) An audit must be carried out upon the winding up of the FMIF: clause 16.10;

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[57] Affidavit of David Whyte paragraph 8
[58] Affidavit of David Whyte paragraph 33-34
[59] *Re Environinvest Limited (No 4)* [2010] 81 ACSR 145
[60] See also *Rivercity* at [80]-[84]

(d) The necessity for an audit to be carried out of the FMIF now (on an annual basis) where ongoing accounts are maintained and where an audit is to be carried out at the end would appear to create an unnecessary liability for the FMIF. The cost of an audit for the 2012 financial year was approximately $500,000[61];

(e) The obligation in clause 27 of the Constitution to which Mr Park refers would not appear to impose an obligation upon the Applicants to carry out such audits prior to the winding up of the FMIF given the provision in clause 16.10;

(f) It is not suggested that the liquidators or LMIM as responsible entity should not comply with any obligations to provide such accounts (should they continue during the course of the winding up) however the Respondent is concerned to avoid duplication and additional costs.

77. As to the assertion in paragraph 46, the present application is not as to who is appropriate to carry out the winding up. It is a question as to who is charged with that role, having regard to the orders made. In any event the Applicants' submissions on this point do not appear to be supported by any evidence. Mr Whyte has been undertaking his role for almost two years and built up considerable knowledge.

78. These submissions now turn to the particular powers and duties mentioned in the schedule to the amended application.

Schedule 1 to the amended application – directions for the liquidators

"Pay the expenses and liabilities of LMIM as far as they relate to the FMIF as determined by proofs of debt and other authorised methods in accordance with sections 477(1)(b), 477(1)(d), 506(3) and 562 of the Act and clause 16.7(b) and 18.1 of the Constitution"

79. It is not apparent why directions are sought for the liquidators by reference to the provisions in the *Corporations Act*. No order has been made appointing them to be responsible for the FMIF. In addition as stated above the present direction appears to be contrary to the power of the Court in s 601 NF given *Re Stacks*. The powers do not otherwise appear to be applicable given that LMIM acted in a number of different capacities and not just as responsible entity of the FMIF.

[61] Affidavit of David Whyte exhibit DW1 page 41

80. Further and more generally, the Constitution imposes duties on the responsible entity, not upon its liquidators. It is unclear, then, why the liquidators seek directions about what they are required to do under the Constitution. Any application for directions should concern what the responsible entity is required to do under clauses 16.7(b) and 18.1 of the Constitution.

81. Clause 16.7 contains a list of things that the responsible entity "must" do upon the winding up of the scheme. Clause 18.1 says the responsible entity may pay all manner of taxes and duties and other defined obligations and liabilities, from scheme property. Mr Whyte understands that McGrathNicol have been meeting such obligations to date.

82. Mr Whyte must have the power to pay liabilities of the type mentioned because:

    (a) it is from scheme property that those liabilities may be paid;

    (b) Mr Whyte as receiver has control of the FMIF property;

    (c) payment of liabilities of the type described must be something necessary to be done for the attainment of the objectives for which the receivers were appointed – sec. 420(1) of the Act.

83. Any powers the responsible entity might yet have under those clauses of the Constitution are therefore not exclusive to it. For that reason, there is no good reason for the court to declare that the responsible entity and its liquidators may still exercise these powers.

84. There is nothing from the terms of the orders appointing Mr Whyte that prevents the liquidators from calling for proofs of debt in respect of claims against the company LMIM and then subsequently making a claim for indemnity from the assets of the FMIF. Pursuant to the orders appointing Mr Whyte as receiver, he can and will address such claims as and when they are made. If there is controversy that emerges from those claims and the manner in which they are addressed by Mr Whyte, that can be addressed by application to the Court as and when such controversy arises for determination. But presently such controversies are hypothetical – as is the need for directions to be made about the power from which such controversies might flow, as there is no material from the applicants that states that such claims are extant or even in contemplation.

85. Insofar as the directions sought by the liquidators would require them to pay (from the property of the FMIF) any class of creditors in full in accordance with s477(1)(b) it is to be noted that this provision expressly operates "subject to the provisions of section 556", which provide for priority payments to certain classes of creditors. That regime of priorities that is inapplicable to dealing with "trust" creditors or the application of fund property (*Re Stacks* at [44]).

86. There should be no orders made where the subject matters of the proposed orders are hypothetical controversies. See *Juniper Property Holdings No 15 P/L v Caltabiano* [2015] QSC 95 per Jackson J at [38] applying *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

"to recover those assets of the FMIF which are available only to the Liquidators because of part 5.7B of the Act"

87. Part 5.7 B is a statutory right of the liquidator and any money recovered is held for the benefit of the company's creditors and contributories[62]. Naturally the liquidator can exercise such powers. Given the nature of the right it is difficult to see how it can relate to the recovery of FMIF assets.

88. However the liquidators' material does not identify other assets of the FMIF which are intended to be recovered by them, when they intend to seek to recover the assets and from whom and whether the action would be for the benefit of the fund. There is therefore no necessity for directions being made regarding the power mentioned in this part of the first schedule to the amended application, as the issue is hypothetical.

"to manage and deal with members, units and the capital of the FMIF as required by the Constitution, in particular, as required by clauses 3.6, 16.6, 16.7(c), 16.7(f), 16.7(g), 18.2 and 21.1, as well as parts 9, 10, 12, 22 and 28 of the Constitution"

89. Again this raises an hypothetical issue: the applicants' submissions are put in terms of there being nothing in the orders of Dalton J that "deal with the obligations on LMIM" to exercise the powers regarding management and dealing with members, units and capital of the FMIF and they refer to there being no "evidence that the applicants are unable to discharge their obligations in that respect." (at paragraph 41) That is not however the relevant question. The absence of a reference in Dalton

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62 *Re Harris Scarfe Ltd (in liq)* (2006) 203 FLR 46 at [26]-[29]

J's orders does not lead to a conclusion that such powers are outside Mr Whyte's role given the general nature of the orders in paragraphs 2, 5 and 6. The powers in paragraphs 16.6, 16.7(1), 16.7(f) and 16.7(g) pertain directly to the winding up. Clause 18.2 would seem to be overtaken by clause 16.7(b). Part 12 would be subject to clause 16.7(c).

90. The Applicants also do not identify any need for the the liquidators to manage and deal with members, units and the capital of the FMIF.

91. Regarding clause 3.6, that clause says that the responsible entity may, at any time, divide the scheme property into a number of units other than the number into which it is presently divided – but such a division must not change the ratio of units in a class registered in an investor's name to the units on issue in that class.

92. Assuming that this power may be exercised during the winding up of the FMIF, it is difficult to see the utility of a declaration to that effect when:

    (a) the liquidators have not, as far as is apparent on the material, suggested that the responsible entity wishes to exercise the power;

    (b) it is not easy to see what benefit may flow to investors from the exercise of the power, and certainly not in light of the inevitable cost that would be entailed in notifying members of the changes (even if that cost were modest).

93. Further, the alteration of the numbers of units on issue – whether by creation or contraction – may amount to the issue of interests in the scheme, something which may not be done: s 601NE(3).

94. Regarding the sub-clauses of clause 16 which are mentioned, they deal with winding up. Clause 16 refers in several places to the responsible entity's winding up the scheme. For instance the responsible entity is to "manage" the scheme until all the winding up procedures have been completed: cl. 16.6. There is a list of things that the responsible entity "must" do upon the winding up of the scheme: cl. 16.7.

95. The fact that a scheme's constitution is to provide for the winding up of a scheme accounts for the references in the Act to a scheme's being "wound up in accordance with its constitution": ss.601NE(1) and (2) and 601NF(1). It explains why one

ground for a court's giving directions about "how a registered scheme is to be wound up" is that the constitutional provisions are inadequate or impractical: sec. 601NF(2).

96. It also explains why paragraph 2 of Dalton J's order refers to Mr Whyte's ensuring that the FMIF is wound up in accordance with its Constitution.

97. The fact that a scheme's constitution is the repository of provisions regulating its winding up (subject to augmentation under s.601NF(2)) means that the qualification in paragraph 2 – that the winding up be in accordance with FMIF's Constitution – is not any limitation of the rights, powers and obligations of the person to whom the responsibility for effecting the winding up is assigned. On the contrary, a requirement that a person ensure that a scheme be wound up in accordance with its Constitution should be seen as:

(a) placing in Mr Whyte's hands the powers and obligations of the responsible entity set out in cl. 16; and

(b) for these reasons, practically speaking, leaving no room for others to carry out winding up tasks independently of Mr Whyte.

98. It follows that it is Mr Whyte who is to exercise the powers and do the things which, under clause 16 of the Constitution, LMIM as the responsible entity would otherwise exercise and do in order to wind up the FMIF.

99. As to clause 18.2 of the constitution, as it makes provision for the payment of liabilities of the FMIF, the submissions made above about clause 18.1 – which provides for the actual payment of such liabilities – equally apply.

100. Given Mr Whyte's powers and responsibilities as receiver of the FMIF assets, any power that the responsible entity may still exercise under clause 18.2 could not be exclusive to it. It should follow that it is not necessary for the court to rule that the responsible entity may exercise this power.

101. As to clause 22 of the Constitution, the maintenance of the register is necessary for the winding up of the Fund to determine the distribution to any members. Mr

Whyte has been responsible for maintaining that register since August 2013 and he informed the Applicants of his position at that time[63].

102. As to clause 28 (regarding meetings of members) there is no basis given for such an order being necessary. Given the FMIF is being wound up it is difficult to see how it could presently arise.

103. Finally, clause 21.1 is purely declaratory. It says that the FMIF's property will be held in the name of the custodian as agent for the responsible entity on the terms of the custody agreement. Therefore, no order is necessary regarding clause 21.1 and its status would be confusing given Mr Whyte is the receiver of the property of the FMIF.

"to determine and report upon the financial status of the FMIF as required by clauses 16.10, 27.1 and 27.4, as well as parts 11, 12 and 14 of the Constitution"

104. Regarding clause 16.10, after the scheme is wound up, the responsible entity must arrange to have an auditor audit the final accounts of the scheme. However the completion of the winding up of the FMIF is as much as two years away and many assets are yet to be sold. The recently commenced action against the former directors of LMIM and others has yet to be resolved.

105. Consequently there would seem to be little point in the court's declaring now that the conduct of a long distant audit is to be arranged solely by the liquidators, particularly when Mr Whyte will hold most of the information necessary for the carrying out of the audit.

106. Regarding clause 27.1, the responsible entity must appoint an auditor to audit the accounts of the scheme regularly and an auditor of the compliance plan. This last point duplicates s 601HG(1) of the Act. Nothing in s 601HG indicates that the auditing obligation it creates is suspended during the winding up of a registered scheme, however the regularity of an audit required would necessarily be influenced by the context of the winding up of the scheme and the terms of s601HA.

107. Under s 601HA of the Act, a compliance plan is to record the adequate measures which a responsible entity is to apply "in operating the scheme" to ensure

[63] Affidavit of David Whyte filed 12 June 2015 exhibit page 257

compliance with the Act. The scheme cannot be said to have been "operating" while it is being wound up.

108. Nevertheless, the matter is now dealt with in s 7 of the ASIC Corporations (Externally-Administered Bodies) Instrument 2015/251. That section relieves a responsible entity from compliance with s 601HG in stated circumstances. The key requirement is that either the responsible entity, or a person in Mr Whyte's position, has lodged a copy of a scheme insolvency resolution with ASIC. Mr Whyte intends to apply for such an exemption: paragraph 35 of his Affidavit.

109. Such a resolution is one to the effect that, for a period of at least 12 months, scheme property has been insufficient to meet debts incurred by the responsible entity in that capacity for the scheme as and when such debts were due and payable.

110. Regarding clause 27.4, the responsible entity is required to do two things by this provision. It must keep and prepare the accounts of the scheme in accordance with applicable accounting standards and the Act and it must also report to members about the affairs of the scheme and their holdings as required by the Act and the Regulations.

111. However Part 5C of the Act and Chapter 5C of the Regulations do not contain any obligation cast upon the responsible entity to provide such reports to members. The coming into force of the 2015 ASIC instrument mentioned earlier makes it unnecessary for the court to give a direction concerning compliance with clause 27.4.

112. Such a direction appears to be unnecessary given the Applicants do not contend that Mr Whyte is not entitled to "determine and report upon the financial status of the FMIF", as he is presently doing and intends to keep doing. If there is doubt as to Mr Whyte's power to report on the the financial status of the FMIF, there should be a declaration that he is so entitled, that being a matter incidental to his appointment to take responsibility of the assets of the FMIF.

Schedule 2 to the application – directions sought for the responsible entity

<u>"to prepare, for each financial year, a financial report for the FMIF, pursuant to Division 1 of Part 2M.3 of the Act"</u>

"to have each such financial report audited in accordance with Division 3 of Part 2M.3 of the Act and to obtain an auditor's report pursuant to section 301 of the Act"

"to report to members of the FMF for each financial year in accordance with Division 4 of Part 2M.3 of the Act"

"to lodge with ASIC the reports for each financial year, pursuant to Division 2 of Part 2M.3 of the Act"

"to prepare, for each half-year, a financial report for the FMIF, pursuant to Division 2 of Part 2M.3 of the Act"

"to have each such half-yearly financial report for the FMIF audited or reviewed in accordance with Division 3 of Part 2M.3 of the Act"

"to lodge with ASIC such half-yearly financial reports and auditor's report pursuant to Division 3 of Part 2M.3 of the Act"

"to engage a registered company auditor, an audit firm or authorised audit company to audit compliance with the FMIF's Compliance Plan in accordance with section 601HB of the Act"

113. Each of these powers in essence repeats the last category of power included in schedule 1 of the amended application and the submissions made regarding that aspect of the amended application apply equally here.

S.E. Brown QC

D. de Jersey

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16 July 2015