

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

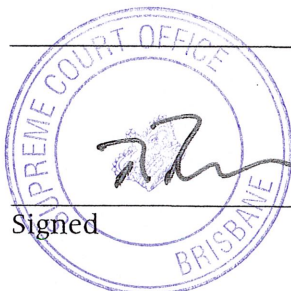
Second Applicant: **LM INVESTMENT MANAGEMENT LIMITED (IN
LIQUIDATION)(RECEIVERS APPOINTED)
ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE
LM FIRST MORTGAGE INCOME FUND ARSN 089 343
288**

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:-



Signed

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Solicitor/Barrister/Justice of the Peace

AFFIDAVIT OF JOHN RICHARD PARK

Filed on behalf of the Applicants

Form 46 Rule 431

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

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

2. Now produced and shown to me and marked "JRP-6" is an indexed, paginated bundle of documents to which I shall refer in this affidavit. References to numbers in [] are references to the page numbers of JRP-6.

3. On 21 February, 2017, the Respondent's solicitors, Tucker and Cowen, wrote to my solicitors, Russells, concerning some discrepancies arising from my affidavit sworn on 18 October, 2016 (which is Court file index document numbered 60 and 61) ("**October Affidavit**"). A copy of that letter appears at [1] to [3].

4. The purpose of this affidavit is to address those discrepancies and clarify some matters in my October Affidavit.

Appeal Costs

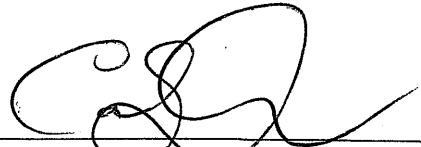
5. Paragraph 16(a) of my October Affidavit summarises the legal expenses incurred in the Appeal as being \$241,453.54. That is inaccurate.

6. That figure comes from my solicitors' letter of 10 February, 2016 referred to in paragraph 13(a) of my October Affidavit. Erroneously, that summary description does not include particular invoices detailed in my letter of 15 February, 2016, referred to in paragraph 13(b) of my October Affidavit.

7. Those additional sums are included in those claimed by paragraph 2 of the Application and the first three entries in the Schedule to the Application, being the following invoices:-

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Solicitor/Barrister/Justice of the Peace

Consultant	Invoice Number	Invoice Date	Claimed Amount
Russells	B17294	10/03/2014	\$25,476.94
Russells	1042	11/09/2014	\$4,950.00
Russells	B22299	15/07/2015	\$315.33

8. Therefore, the figure in paragraph 16(a) should be \$272,195.81.

9. Those invoices were claimed in my letter of 15 February, 2016 referred to in paragraph 13(b) of my October Affidavit. There is no separate justification for those costs of the Appeal other than that set out in paragraphs 21 to 36 of my October Affidavit.

Books and Records

10. Reference to one of the invoices claimed under this category was not included in the explanation contained in paragraphs 73 to 78 of my October Affidavit.

11. That invoice is referred to in the Schedule to the Application as:-

Consultant	Invoice Number	Invoice Date	Claimed Amount
Russells	B22433	02/01/2016	\$1,920.42

12. The invoice was not assessed by Mr Hartwell for the reasons set out in paragraph 86 of my October Affidavit.

13. The invoice formed part of the claim for indemnity made by my letter of 15 February, 2016 referred to in paragraph 13(b) of my October Affidavit. There is no separate justification for that invoice other than that set out in paragraphs 50 to 72 of my October Affidavit.

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Signed

Solicitor/Barrister/Justice of the Peace

Costs Assessment Application

14. My October Affidavit omits an explanation for particular legal expenses in respect of Mr Whyte's challenge to my appointment of Mr Hartwell. That omission was due to oversight.

15. The relevant invoices are contained in the Schedule to the Application as:-

Consultant	Invoice Number	Invoice Date	Claimed Amount
Russells	B20191	22/12/2014	\$2,200.00
Russells	B22835	31/08/2015	\$7,826.96
Russells	B23062	30/09/2015	\$3,506.23
Russells	B23465	30/10/2015	\$10,000.83
Russells	B23749	30/11/2015	\$16,174.44
Russells	B23944	21/12/2015	\$1,067.91
<i>Less partial payment of B22835, B23062, B23465, B23749, B23944</i>			<i>(\$18,000.00)</i>

16. Those invoices formed part of the claim for indemnity made by my letter of 15 February, 2016 referred to in paragraph 13(b) of my October Affidavit.

17. I have explained the circumstances and basis for Mr Hartwell's appointment in paragraphs 38 to 39 and 84 to 90 of my October Affidavit.

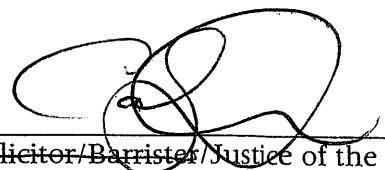
18. The invoices referred to in paragraph 15 herein relate to the legal expenses of an application brought by the Respondent in relation to Mr Hartwell's appointment.

19. On 16 September, 2015, in proceeding number 3383 of 2013 in the Supreme Court of Queensland, the Respondent, on behalf of the FMIF, made an application for numerous directions, including most relevantly, a direction that he be entitled to make submissions to Mr Hartwell in respect of the assessment of the Applicants' legal bills.

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Signed



Solicitor/Barrister/Justice of the Peace

20. The relevant court documents in that proceeding, being number 3383 of 2013, which I will not exhibit to this affidavit, are as follows:-

Court File No	Date Filed	Document Type	Description
287	16/09/2015	Application	
288	16/09/2015	Affidavit	D H SCHWARZ EXH'S DHS - 1 - DHS21
289	15/10/2015	Affidavit	D WHYTE & EXH'S "DW-1 - DW-13"
290	20/10/2015	Outline of Submissions	OUTLINE OF SUBMISSIONS OF THE FIRST RESPONDENT/RUSSELS
291	20/10/2015	Outline of Submissions	OUTLINE OF SUBMISSIONS ON BEHALF OF DAVID WHYTE
292	20/10/2015	Affidavit	S.C. RUSSELL & EXH SCR-1
293	20/10/2015	Affidavit	M.W.P. ZIEBELL
294	29/10/2015	Reasons for Judgment	JACKSON J 29/10/2015

21. The Respondent's application was dismissed by the Court in *Whyte v LM Investment Management Limited (in liq)(rcvrs & mgrs apptd) & Ors* [2015] QSC 303, a copy of which appears at [4] to [14].

22. The Respondent was ordered to pay the Applicants' (in this proceeding) costs of the application.

23. Following correspondence between our respective solicitors (which I will not exhibit because it was on a "without prejudice" basis), the Respondent's liability under that costs order was agreed to be \$18,000.00.

24. The amounts referred to in paragraph 15 herein represent the difference between the costs which the Applicants actually incurred with their solicitors and the amount paid by the Respondent on account of those costs. That sum totals \$22,776.37.

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Solicitor/Barrister/Justice of the Peace

25. I have taken legal advice about these matters (the privilege in which I do not intend to waive). On the basis of that advice, I believe that the agreement referred to in paragraph 23 herein only determines Mr Whyte's liability under the costs order and not the Applicants' entitlement to an indemnity under the constitution of the FMIF.

26. I therefore believe the expenses described by the invoices referred to in paragraph 15 herein were reasonable and are properly to be indemnified out of the assets of the FMIF.

27. I also hold that belief because:-

- (a) of the reasons relating to Mr Hartwell's appointment explained at paragraphs 38 to 39 and 84 to 90 of my October Affidavit;
- (b) while the invoices to be assessed by Mr Hartwell did not relate exclusively to the FMIF and were not intended to be determinative of the Applicants' entitlement to an indemnity from the assets of the FMIF:-
 - (i) the only person who sought to interject in the process of Mr Hartwell's assessment was the Respondent, acting on behalf of the FMIF; and
 - (ii) the only issues raised on that application related to the FMIF; and
- (c) I believed it appropriate and necessary to defend the application in order to attempt to ensure that the independent review of the Applicants' expenses (referred to in paragraphs 38 and 39 of my October Affidavit) occurred with the minimum necessary cost and inconvenience.

Mr Hartwell's Invoices

28. The Schedule to the Application claims the following invoice:-

Consultant	Invoice Number	Invoice Date	Claimed Amount
Hartwell Lawyers	N/A	02/01/2016	\$9,068.68

29. Tucker and Cowen's letter drew my attention to the fact that sum is claimed in the amounts sought by paragraph 1(a) of the Application and as set out in detail in Russells' letter of 10 February, 2016, referred to in paragraph 13(a) of my October Affidavit.

30. That is an error. I do not intend to claim twice for that invoice and it is most conveniently included in the Applicants' claim for indemnity only in relation to paragraph 1(a) of the Application.

Updated Claim Schedule

31. Taking those matters into account (along with the matters set out in paragraph 82 of my October Affidavit), the below schedule sets out the sum which the Applicants now intend to claim pursuant to paragraph 1(b) of the Application:-

Consultant	Invoice Number	Invoice Date	Claimed Amount
Russells	B17294	10/03/2014	\$25,476.94
Russells	1042	11/09/2014	\$4,950.00
Russells	B22299	15/07/2015	\$315.33
Russells	B17488	28/03/2014	\$1,265.01
Russells	B18884	26/08/2014	\$566.48
Russells	B24316	29/01/2016	\$1,920.42
Russells	B18603	28/07/2014	\$92.69

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Solicitor/Barrister/Justice of the Peace

Russells	B22433	02/01/2016	\$9,967.32
Russells	B22832	31/08/2015	\$3,525.82
Russells	B23055	30/09/2015	\$1,390.62
Russells	B13460	30/10/2015	\$4,646.14
Russells	B23746	30/11/2015	\$5,857.84
Russells	B22835	31/08/2015	\$7,826.96
Russells	B23062	30/09/2015	\$3,506.23
Russells	B23465	30/10/2015	\$10,000.83
Russells	B23749	30/11/2015	\$16,174.44
Russells	B23944	21/12/2015	\$1,067.91
<i>Less partial payment of B22835, B23062, B23465, B23749, B23944</i>			<i>(\$18,000.00)</i>
Hartwell Lawyers	N/A	02/01/2016	\$399.21
Hartwell Lawyers	N/A	02/01/2016	\$606.60
Hartwell Lawyers	N/A	02/01/2016	\$2,699.84
Hartwell Lawyers	N/A	02/01/2016	\$2,361.45
Hartwell Lawyers	N/A	02/01/2016	\$212.76
Arthur J Gallagher	289543/289547	02/11/2015	\$61,391.78
		Total	\$148,222.62

32. The total sum in respect of which the Applicants intend to seek an order in the terms of paragraph 2 of the Application is therefore \$389,676.16.

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Signed

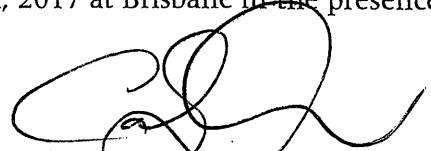
Solicitor/Barrister/Justice of the Peace

33. 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 ^{3rd} March, 2017 at Brisbane in the presence of:



Deponent



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



SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 3508 of 2015

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

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

AND

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


AND

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

Exhibit JRP-6 to the Affidavit of **JOHN RICHARD PARK** sworn ^{20th} March, 2017:



Deponent



Solicitor/Barrister/Justice of the Peace



CERTIFICATE OF EXHIBIT

Filed on behalf of the Applicants

Form 47 Rule 435

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

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**

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INDEX TO EXHIBIT JRP-6

Document	Date	Page No
Letter from Tucker & Cowen Solicitors to Russells	21/02/2017	1 – 3
<i>Whyte v LM Investment Management Limited (in liq)(rcvrs & mgrs apptd) & Ors [20105] QSC 303</i>	29/10/2015	4-14

Tucker & Cowen Solicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

Level 15, 15 Adelaide St. Brisbane. Qld. 4000 / GPO Box 345. Brisbane. Qld. 4001.
Telephone. 07 300 300 00 / Facsimile. 07 300 300 33 / www.tuckercowen.com.au

Our reference: Mr Schwarz / Mr Ziebell

21 February 2017

Your reference: Mr Tiplady / Mr Sean Russell

Principals.
David Tucker.
Richard Cowen.
David Schwarz.
Justin Marschke.
Daniel Davey.

Mr Ashley Tiplady and Mr Sean Russell
Russells Lawyers
Brisbane Qld 4000

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

Special Counsel.
Geoff Hancock.
Alex Nise.
Paul McGarry.

Associates.
Marcelle Webster.
Emily Anderson.
Olivia Roberts.
James Morgan.

Dear Colleagues

Re: LM Investment Management Limited (In Liquidation) (Receivers & Managers Appointed) ("LMIM");
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v David Whyte
Supreme Court of Queensland Proceeding No. 3508/2015;
Application filed 20 May 2016 ("Application") - Review 16 February 2017

We refer to the review before Jackson J on 16 February 2017.

You will recall that, during the exchange before his Honour, mention was made of our outstanding requests to you, regarding:-

1. (requested in our letter of 3 February 2017) a complete reconciliation of the amounts invoiced in respect of various fees, and also of amounts paid, as between:-
 - (a) The FMIF and LMIM (in its corporate capacity); and
 - (b) LMIM (whether in its own corporate capacity or as responsible entity for the FMIF) and LMA; and
2. (requested in our letter of 15 February 2017) the 'paginated bundle of documents' referred to in paragraph 14 of John Park's affidavit sworn 18 October 2016 ("Mr Park's Affidavit").

It was suggested during the review that the provision of the reconciliation and the bundle would not be difficult, and could be done promptly. We look forward to receiving that material as a matter of priority.

Amounts claimed, but not addressed in evidence

By our letter of 15 February 2017, we noted that Mr Park's Affidavit addressed only some, but not all, of the claims the subject of the Application.

We note this discrepancy was not ventilated before his Honour last week.

Those invoices which do not appear to be justified or supported by your clients' evidence (by reference to the Schedule to the Application ("the Schedule")), and separated by matter descriptions) are:-

1. Appeal from decision of Dalton J; invoice numbers B17294, 1042 and B22299.

2. Remuneration claim; invoice numbers B18824 and B20191.
3. Books and records; invoice number B22433.
4. Cost assessment application (being the application by Mr Whyte for directions of which an agreed amount of costs have already been paid); invoice numbers B20191, B22835, B23062, B23465, B23749 and B23944.

The total amount of these invoices is \$82,304.64 (inclusive of GST). As was noted in our letter of 15 February 2017, Mr Park's Affidavit makes express reference, by way of justification or explanation in the body of the affidavit, to only \$328,390.20 of the \$410,694.84 claimed by the application.

If any, or all, of the claims the subject of the above invoices are being pressed, please let us know as a matter of urgency; our client will need to address these further bills in his material and submissions to the Court. If the claims are not pressed, would you please provide us with an amended Schedule to the application, amended to include only those invoices claimed (of course, this should appropriately also be filed with the Court as an Amended Application).

Stephen Hartwell assessment of appeal costs

We also note that a separate entry with respect to Mr Hartwell's assessment of the appeal costs has been included in the Schedule at line 4 (bill said to be "N/A"); that amount for Mr Hartwell's assessment has been incorporated into Mr Hartwell's cost certificate for the appeal assessment (a copy of which appears at page 207 of Mr Park's Affidavit), and therefore appears to have been claimed twice.

Please let us know whether our understanding is correct and whether this amount will be removed from the Schedule, or deducted from the \$241,453.54 claimed separately by your letter of 15 February 2016, and paragraph 1(b) of the Application.

GST

We also note that the amounts the subject of the claims from the FMIF appear to include a portion in respect of GST. The parties have, in previous correspondence, ventilated this issue. To summarise, your clients, enjoying an entitlement to input tax credits, are, in turn, not entitled to the GST component of the claims from the FMIF.

Please let us know if you disagree, otherwise, please provide us with a revised Schedule of amounts claimed, reduced by the quantum of GST for each respective invoice.

Advice to LMIM, Mr Park & Ms Muller

Your clients have said that they rely upon certain legal advice obtained by them (both as to loan management fees charged pre-appointment, and as to the continued charging of those fees after their appointment) as justification for charging the loan management fees. If your clients intend to rely on their having acted on that advice for the purposes of the Application, and in the Points of Defence to be filed with the Court in accordance with the directions of Jackson J made on 16 February 2017, that advice will of course need to be put in evidence.

Once again, we request a copy of that advice.

Threat of personal costs order against Mr Whyte

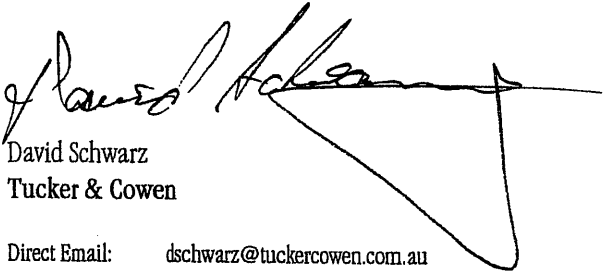
It was said by Mr Peden of Counsel, at the review last Thursday, that the threat of legal costs regarding Mr Whyte's opposition to the Application was "*only directed against Mr Whyte, not directed at the solicitors*".

While this is in contrast to the position contained in your letter of 11 May 2016 (which appears at pages 112 – 118 of JRP-5 to the Mr Park's Affidavit), it is nonetheless relevant that your clients have threatened seeking an order that Mr Whyte personally pay your clients' costs of the Application, without recourse to the assets of the FMIF.

Please let us know, by return, whether your clients continue to maintain that position. While our client has no desire to burden the FMIF with the cost of an application for directions concerning our client's role in the Application, such an application is plainly appropriate in circumstances where your clients have said that they consider it appropriate to seek such an order against Mr Whyte. Accordingly, please let us know if your clients now unequivocally accept that Mr Whyte ought to be entitled to be indemnified from the assets of the FMIF for the costs of responding to the Application.

We look forward to hearing from you.

Yours faithfully



David Schwarz
Tucker & Cowen

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

Individual liability limited by a scheme approved under Professional Standards Legislation.

SUPREME COURT OF QUEENSLAND

CITATION: *Whyte v LM Investment Management Limited(in liq)(rcvrs & mgrs apptd) & Ors* [2015] QSC 303

PARTIES: **RAYMOND EDWARD BRUCE AND VICKI PATRICIA BRUCE**
(applicant)

AND

LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)(RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND
(first respondent)

AND

THE MEMBERS OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288
(second respondent)

AND

ROGER SHOTTON
(third respondent)

AND

AUSTRALIAN SECURITIES & INVESTMENT COMMISSION
(intervener)

FILE NO/S: BS3383/13

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 29 October 2015

DELIVERED AT: Brisbane

HEARING DATE: 20 October 2015

JUDGE: Jackson J

ORDER: **The order of the court is that:**

- 1. The application is dismissed.**
- 2. The applicant pay the respondents' costs of the application.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – REMUNERATION – TAXATION AND ASSESSMENT OF

COSTS – APPLICATIONS AND REFERENCES – where the applicant was appointed as a receiver by the court – where the respondent is the responsible entity for a managed investment scheme – where an order for assessment of costs was made of legal costs payable by the respondent to a law practice under the *Legal Profession Act 2007* (Qld) – where the applicant receiver was not given notice or served with the application for the costs assessment – whether the applicant is a “non-associated third party payer” under the *Legal Profession Act 2007* (Qld) – whether the costs are “payable out of a fund”

Civil Proceedings Act 2011 (Qld), s 15

Legal Profession Act 2007 (Qld), ss 300, 301, 329, 330, 332, 335, 336, 339, 341

Uniform Civil Procedure Rules 1999 (Qld), rr 678, 680, 681, 700, 703, 705, 720, 743A, 743C, 743D, 743I

Boyce v Macintyre (2009) NSWLR 152; [2009] NSWCA 185, referred to

Equuscorp Pty Ltd v Short Punch & Greatorix [2001] 2 Qd R 580; [2000] QCA 407, referred to

Huntingdale Village Pty Ltd & Ors v Mallesons Stephen Jaques [2013] WASC 48, referred to

Legal Services Commissioner v Wright [2012] 2 Qd R 360; [2010] QCA 321, followed

Shillington v Harries [2013] NSWSC 1202, considered

COUNSEL: D de Jersey for the applicant
J Peden for the respondents

SOLICITORS: Tucker & Cowen for the applicant
Russells for the respondent

- [1] **JACKSON J:** The respondent company to the present application, LM Investment Management Limited (in liquidation)(receivers and managers appointed) (“the respondent”) is the responsible entity and trustee of a managed investment scheme that is a registered scheme known as “the LM First Mortgage Income Fund” (“FMIF”).
- [2] On 21 August 2013, the Court made an order under s 601ND(1) of the *Corporations Act 2001* (Cth) (“CA”), directing the respondent to wind up the FMIF. Shortly afterwards the respondent was ordered to be wound up in insolvency.
- [3] By another provision of the orders made on 21 August 2013, the applicant, Mr Whyte, was appointed under s 601NF(1) as a person to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and any orders made under s 601NF(2) of the CA. He was also appointed receiver of the property of the FMIF under s 601NF(2).

- [4] This application is yet another dispute between these parties in the context of the winding up of the FMIF. The applicant applies for directions as a court appointed receiver.
- [5] On 29 July 2015, pursuant to r 743E of the *Uniform Civil Procedure Rules 1999* (Qld) (“UCPR”), the Court ordered that 38 invoices for legal costs (“the bills”) be assessed. The invoices are for legal costs alleged to be payable under the *Legal Profession Act 2007* (Qld) as between a client and law practice. The client is the respondent or the liquidators of the respondent. The law practice is the firm of Russells (“the law practice”). The law practice applied for the order for the costs assessment.
- [6] The applicant was neither given notice of the application for the costs assessment nor was he served with that application. By the present application he applies for directions as to whether he was entitled to notice of the application, to be served with a copy of the application for the costs assessment and is entitled to notice of the costs assessment. If he is, he will have consequential rights to participate in or make submissions in the costs assessment.
- [7] The application turns on the operation of two statutory provisions. First, Mr Whyte submits that he is a “non-associated third party payer” within the meaning of s 301(3) of the *Legal Profession Act 2007* (Qld) (“LPA”). If he is, it does not appear to be in dispute that he was a person entitled to be served with the application for the costs assessment and to participate in the costs assessment.
- [8] Second, he submits that the costs assessment is subject to r 720 of the UCPR. Accordingly, he contends that within the meaning of r 720(3) “the costs are payable out of a fund”, being the FMIF and he is “the person having charge of the fund” who must be served with notice of the costs assessment. Again, it does not seem to be disputed that if the rule applies in that way he would be entitled to make submissions to the costs assessor in relation to the assessment.
- [9] For the reasons that follow, in my view, Mr White as a person appointed to ensure that the FMIF is wound up in accordance with its constitution and as receiver of the property of the FMIF is neither a “non-associated third party payer” in respect of the legal costs payable by the respondent to the law practice, nor does r 720 of the UCPR entitle him to notice of the costs assessment or to make submissions in relation to the same.

Non-associated third party payer

- [10] Some of the bills are or will be said by the respondent to have been payable or to be payable in whole or in part from the property of the FMIF. For example, 14 of them have already been paid in whole or in part from that property.
- [11] However, it is also not in dispute that some of the bills or some parts of them are not said to be payable from the property of the FMIF. For the purposes of this application it is unnecessary to attempt to isolate or categorise individual bills further. It is convenient simply to proceed on the assumption that there is a class of bills which after assessment the respondent will say are payable wholly or in part from the property of the FMIF.

[12] To the extent that such an indemnity is claimed, the source of the right to an indemnity may be found in the constitution of the FMIF or the equitable right of a trustee to indemnity for expenses incurred properly or the statutory right of a trustee to an indemnity for expenses reasonably incurred in or about the execution of the trusts or powers.

[13] The scheme of the relevant provisions in ch 3 of the LPA is that a “third party payer” is a person other than the client who is to be given notice of a costs assessment as between a law practice and the client and is entitled to participate as a party in the costs assessment process. The class of third party payers is broken into two sub-classes. One of them is a “non-associated third party payer”. The relevant terms are defined in s 301 of the LPA as follows:

- “(1) A person is a *third party payer*, in relation to a client of a law practice, if the person is not the client and—
- (a) is under a legal obligation to pay all or any part of the legal costs for legal services provided to the client; or
 - (b) being under that obligation, has already paid all or a part of those legal costs.
- (2) A third party payer is an *associated third party payer* if the legal obligation mentioned in subsection (1)(a) is owed to the law practice, whether or not it is also owed to the client or another person.
- (3) A third party payer is a *non-associated third party payer* if the legal obligation mentioned in subsection (1)(a) is owed to the client or another person but not the law practice.
- (4) A legal obligation mentioned in subsection (1) can arise by or under contract or legislation or otherwise.
- (5) A law practice that retains another law practice on behalf of a client is not on that account a third party payer in relation to that client.”

[14] Accordingly, the applicant’s right or entitlement to notice of the costs application and to participate in the costs assessment process as a party¹ depends on whether or not he is a third party payer as a “non-associated third party payer” in relation to the legal costs for legal services under the relevant bills.

[15] To be a “third party payer” under s 301(1)(a), the applicant must be “under a legal obligation to pay all or any part of [those] legal costs”.² It is enough if the legal obligation is owed to the respondent as the client of the law practice.³ That would make the applicant a non-associated third party payer. As well, the legal obligation “can arise by or under contract or legislation or otherwise.”⁴

¹ *Legal Profession Act 2007 (Qld)*, s 339.

² Alternatively, the applicant must have been under that obligation when a relevant tax invoice was paid.

³ *Legal Profession Act 2007 (Qld)*, s 301(3).

⁴ *Legal Profession Act 2007 (Qld)*, s 301(4).

- [16] The applicant's position is unusual. He is the receiver of the property of the FMIF. The FMIF is constituted in law as a trust. The respondent as responsible entity is the trustee and the members of the FMIF are the beneficiaries. In a general sense, it is the respondent's role as responsible entity and trustee exercising its powers in the administration of the registered scheme and trust that engages any right to an indemnity as previously mentioned.
- [17] Both under the present LPA, which has equivalent counterparts in other States, and under prior legislation, questions have arisen about the entitlement of a beneficiary of a trust to be involved in the taxation or assessment of costs as between a law practice and the trustee. The parties made their submissions as though the applicant is in a position analogous to a beneficiary of a trust as someone appointed as receiver to take possession of the property of the trust fund.
- [18] In *Equuscorp Pty Ltd v Short Punch & Greatorix*,⁵ it was held that the holder of units in a unit trust was not entitled to apply to the court to decide the reasonableness of the fees and costs charged in a solicitor's account to the trustee, because the unit holder as beneficiary was not "liable to pay" the account within the meaning of s 6ZF(1) of the *Queensland Law Society Act 1952* (Qld). An important point was that, under an earlier statutory provision, the meaning of "liable to pay" had been expressly extended to a party interested in property out of which a trustee had paid or was entitled to pay the bill. That extending provision had been repealed. In that context, the Court of Appeal held that the unit holder's liability to contribute to a fund from which the costs might be paid was not enough to make the unit holder "liable to pay" within the meaning of s 6ZF(1).
- [19] In *Boyce v Macintyre*⁶ the Court of Appeal of New South Wales considered the meaning of s 302A of the *Legal Profession Act 2004* (NSW), which corresponds to s 301 of the LPA. It said:
- "... the introduction in 2006 of the non-associated third party payer provisions in the Legal Profession Act... can be seen as being for the purpose of consumer protection. In particular, the introduced provisions afford protection to persons who agree, in effect, to indemnify other parties (such as lessors and mortgagees) in respect of legal costs for services rendered to those parties."
- [20] The context in that case was the contractual liability of a sub-lessee to pay the sub-lessor's lawyers costs of the transaction.
- [21] In *Legal Services Commissioner v Wright*⁷ the Court of Appeal considered the position of a person who was a party to a consent order providing that the proceeds of sale of property to be sold on a statutory trust for sale were to be applied to the costs of a solicitor (who was another party's solicitor). The question was whether the person was a third party payer. It was held that by the direct operation of the court order, the person was under a legal obligation to pay all or any part of the legal costs within the meaning of s 301(1). However, McMurdo J analysed the operation of the definition of "non-associated third party payer" under s 301(3) as well, as follows:

⁵ [2001] 2 Qd R 580.

⁶ (2009) 78 NSWLR 152.

⁷ [2012] 2 Qd R 360.

“As *Equuscorp* illustrated, there are likely to be many cases where the burden of a lawyer’s bill will fall to a substantial extent upon someone other than the client and who therefore has more than an academic interest in having the costs assessed. But where the line is to be drawn, in defining who apart from the client should be entitled to an assessment, has been decided by the Parliament in unambiguous terms: it is according to the existence or otherwise of a legal obligation to pay the costs.

A case such as *Equuscorp* would not entitle the unit holder to an assessment of the trustee’s legal costs under s 335, because the unit holder’s obligations would not include an obligation to pay *the costs*, as distinct from having to pay to a fund from which those costs and other expenses might be paid.”⁸

[22] I entirely agree.

[23] In *Huntingdale Village Pty Ltd & Ors v Mallesons Stephen Jaques*⁹ Le Miere J considered whether a company (at the suit of its directors) was a non-associated third party payer in respect of the legal costs for legal services provided by a law practice to a receiver of the company appointed by a secured creditor. His Honour considered a number of cases, including *Legal Services Commissioner v Wright*. The company contended that because it had promised the secured creditor that it would indemnify a receiver against any liability, loss, cost or expenses, it was a non-associated third party payer. Le Miere J held that the question was a real question to be tried.

[24] In *Shillington v Harries*,¹⁰ Latham J considered whether beneficiaries of a trust for sale were non-associated third party payers under s 302A of the New South Wales Act. The beneficiaries submitted that because beneficiaries effectively indemnify a trustee against the expenditure of costs legitimately incurred in the administration of the trust there was a legal obligation to pay those costs. In particular, they submitted that the obligation came within the words in the equivalent of s 301(4) set out above that a legal obligation “can arise by or under contract or legislation or otherwise”, because the equitable right to an indemnity was a liability in the beneficiaries “otherwise”.

[25] Latham J held that:

“I am not persuaded by the defendant’s submission that ‘otherwise’ is capable of comprehending other than a legal obligations. To adopt such a construction would seem to me to ignore the context within which the term appears, in particular the deliberate omission from the Act in 2006 of an express provision recognising the right of a beneficiary to apply for an assessment of legal costs paid out of the assets of a trust.”¹¹

⁸ [2012] 2 Qd R 360, 371 [28]-[29].

⁹ [2013] WASC 48.

¹⁰ [2013] NSWSC 1202.

¹¹ *Shillington v Harries* [2013] NSWSC 1202, [36].

- [26] Again, having regard to the similar statutory history in Queensland to the provisions referred to by Latham J in New South Wales, I agree.
- [27] It follows, in my view, that a member of the FMIF is not a non-associated third party payer in relation to the legal costs for legal services provided to the respondent by the law practice as responsible entitle and trustee of the FMIF. Because a member is not a third party payer the members are not entitled to notice of the costs application under s 339(1) of the LPA and are not entitled to participate in the costs assessment process under that section.
- [28] To the extent that the applicant made his submissions by analogy with the position of the members of the FMIF as beneficiaries, in my view, the applicant is not a "non-associated third party payer". The applicant did not submit that he was personally liable to pay any of the bills.

Rule 720 of the UCPR

- [29] Chapter 17A of the UCPR deals with costs.
- [30] Part 3 of ch 17A is headed "Assessment of costs other than under the Legal Profession Act 2007".
- [31] An assessment of costs under pt 3 of ch 17A (being costs other than under the LPA) begins, under r 705(1) with a party entitled to be paid costs serving "a costs statement in the approved form on the party liable to pay the cost" and follows steps that may end with a costs assessment carried out under r 720.
- [32] Rule 720 of the UCPR provides:

"720 Procedure on assessment

- (1) A costs assessor appointed to carry out a costs assessment is to decide the procedure to be followed on the assessment.
- (2) However, the procedure must be—
 - (a) appropriate to the scope and nature of the dispute and the amount in dispute; and
 - (b) consistent with the rules of natural justice; and
 - (c) fair and efficient.
- (3) Also, **if the costs are payable out of a fund—**
 - (a) the applicant must serve on **the person having charge of the fund** a notice—
 - (i) identifying the fund; and
 - (ii) stating that the costs in the costs statement to be assessed are payable out of the fund; and
 - (iii) stating when the costs are to be assessed; and
 - (iv) containing or attaching any other information the costs assessor requires to be included in or with the notice; and
 - (b) the person having charge of the fund may make submissions to the costs assessor in relation to the assessment.

- (4) Without limiting subrule (1) or (2), the costs assessor may decide to do all or any of the following—
- (a) hear the costs assessment in private;
 - (b) carry out the costs assessment on the papers without an oral hearing;
 - (c) not be bound by laws of evidence or procedure applying to a proceeding in the court;
 - (d) be informed of the facts in any way the costs assessor considers appropriate;
 - (e) not make a record of the evidence given.” (emphasis added)

- [33] Accordingly, if the costs are payable out of a fund the applicant for a costs assessment under pt 3 is required to serve on the person having charge of the fund a notice identifying the fund and “stating that the costs in the costs statement to be assessed are payable out of the fund”.
- [34] The reason for my conclusion that the applicant is not entitled to notice of the costs assessment or to make submissions to the costs assessor is that, in my view, the costs the subject of the bills are not “payable out of [the] fund” within the meaning of r 720. It is necessary to explain the operation of r 720 in a costs assessment to which it applies in more detail.
- [35] Chapter 17A was introduced to the UCPR after the LPA came into force in 2007. The rules as to costs that had previously appeared in Part 2 of Ch 17 of the UCPR were repealed and replaced in ch 17A.
- [36] Chapter 17A is divided into four parts. Part 1 contains definitions and provides as to the application of the different parts. Rule 678(2) provides that pt 3 does not apply to costs to be assessed under the LPA.
- [37] Part 2 of ch 17A deals with the costs of a proceeding, meaning a proceeding in the court, beginning with r 680 that provides a party to a proceeding cannot recover any costs of the proceeding from another party other than under the rules or an order of the court. The court’s power to order costs is now conferred by s 15 of the *Civil Proceedings Act 2011* (Qld) and the rules in pt 2 of ch 17A, in particular r 681(1).
- [38] Part 3 of ch 17A provides for the assessment of costs other than under the LPA. Generally speaking, that is the assessment of the costs payable under an order for costs.
- [39] Thus, a costs assessment under an order for cost begins, as appears above, with a costs statement under r 705, in the approved form. The other requirements for a costs statement are set out in r 705(2). It must “contain sufficient details to enable the party liable to pay the costs to understand the basis for the costs, prepare an objection to the costs statement and obtain advice about an offer to settle the costs.” Part 3 then provides for the processes of notice of objection to the costs statement, default assessment, application for a costs assessment and appointment of a costs assessor. It also provides for the powers of a costs assessor and the procedure to be followed on the assessment, culminating with r 720.

- [40] In contrast, pt 4 of ch 17A provides for assessment of costs under the LPA. Generally speaking, they are the costs as between a law practice and a client when a client instructs a law practice, as opposed to costs payable under an order of the court. Part 3.4 of the LPA makes provision for the regulation of those costs.
- [41] Thus, s 329(1) of the LPA prohibits a law practice from starting legal proceedings to recover legal costs until 30 days after the law practice has given “a bill” to the relevant person. Section 330(1) provides that a bill may be in the form of a “lump sum bill” or “an itemised bill”. Under s 332(1) if the bill is in the form of a lump sum bill any person who is entitled to apply for an assessment may request an itemised bill.
- [42] As defined in s 300 of the LPA, a “lump sum bill” is a bill that describes the legal services to which it relates and specifies the total amount of the legal costs and an “itemised bill” is a bill stating, in detail, how the legal costs are made up in a way that would allow the legal costs to be assessed under div 7 of pt 3.4 of the LPA.
- [43] Division 7 of pt 3.4 of the LPA provides for the assessment of costs under the LPA. It contains processes for an application for a costs assessment by a client, a third party payer or law practice. Sections 335 and 336 provide that a client, third party payer or law practice may apply for a costs assessment. Section 339(1) refers to the applicant for assessment giving notice of the costs application under the UCPR.
- [44] The criteria for the costs assessment are set out in s 341 of the LPA. The costs assessor must consider, inter alia:
- “(a) whether or not it was reasonable to carry out the work to which the legal costs relate; and
 - (b) whether or not the work was carried out in a reasonable way; and
 - (c) the fairness and reasonableness of the amount of legal costs in relation to the work, except to the extent that section 340 applies to any disputed costs.”
- [45] All of this proceeds by reference to a relevant lump sum bill or itemised bill under the LPA, not to a costs statement under r 705 of the UCPR. That point is reinforced by r 743C of the UCPR. It provides that if there is no itemised bill the relevant court may give a direction for one to be prepared.
- [46] By r 743A of the UCPR a person applying for a costs assessment under the LPA must apply to the relevant court.
- [47] By r 743D(1) of the UCPR the applicant for a costs assessment under the LPA must serve a copy of the application on any person to whom notice must be given under s 339(1) of the LPA. By r 743D(2), if the person served under sub-rule (1) knows a third party payer should have been but was not served, the person must, within 14 days after being served, give the applicant written notice of that fact and the name and contact details for the third party payer. By r 743D(3), as soon as practicable, but no more than 14 days after receiving a notice under sub-rule (2) the applicant must serve a copy of the application on the third party payer.
- [48] Rule 743I of the UCPR is in pt 4 of ch 17A. It provides, in part, as follows:

“(1) The following rules also apply to costs assessed under the Legal Profession Act 2007–

- ...
- Rule 720
- ...”

- [49] In this context, it can be seen that although r 743I expressly applies r 720 to costs assessed under the LPA, there are some inconsistencies of language and process in seeking to do so. First, there is no costs statement required on a costs assessment under the LPA, and r 720 does not require one in lieu of a bill or itemised bill. References in r 720 to a “costs statement”, when applied to a costs assessment under pt 4 of ch 17A must be treated as references to any relevant bill or itemised bill, *mutatis mutandis*.
- [50] Second, in construing the expression “costs are payable out of a fund”, the context is that r 720 in its primary operation is intended to apply to situations where costs are payable out of a fund under pt 2 of ch 17A. In that context, it encompasses costs payable out of a fund because of an order. See, for example, rr 700(2) and 703(2)(a) of the UCPR.
- [51] In cases where a trustee is either the party ordered to pay costs or has the benefit of an order for costs, it will be a party to any costs assessment under pt 3 of ch 17A upon the order. The trustee in those cases does not require notice under s 720(3) to become involved in the assessment. It is already a party.
- [52] The requirement of notice to a “person having charge of the fund” under r 720(3) is intended to operate where that person is not already a party to the costs assessment. That will occur, for example, in trust or estate proceedings where the court orders that the costs of a party or parties be paid out of the trust property or the estate, including cases where the trustee or executor is not an active party.
- [53] In any event, under r 720(3), the trigger for the rights of a person having charge of the fund is that the “costs are payable out of a fund”. In my view, costs are so payable when they are payable under an order of the court, not otherwise.
- [54] Of course, the application of r 720 to a costs assessment under the pt 3.4 of the LPA is necessarily to the assessment of costs that are not payable under an order of the court. Accordingly, as construed above, r 720(3) would not apply to the costs to be assessed.
- [55] In my view, the application of r 720 to a costs assessment under the LPA does not alter the meaning of when “costs are payable out of a fund” within the meaning of r 720(3).
- [56] It follows, in my view, that the costs payable by the respondent as client to the law practice are not costs “payable out of a fund” within the meaning of r 720(3) of the UCPR in its ordinary operation.
- [57] It also follows that the law practice (as applicant for the costs assessment) was not obliged to give notice to the applicant under r 720(3) of the UCPR as a person having charge of the FMIF as a fund.

Conclusion

[58] The application must be dismissed.

[59] I will hear the parties on the question of costs.