SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

First Applicant:	JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION) (RECEIVERS AND MANAGERS 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 AND MANAGER 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

AFFIDAVIT OF DAVID HEINER SCHWARZ

I, DAVID HEINER SCHWARZ of Level 15, 15 Adelaide Street, Brisbane in the State of Queensland, solicitor, state on oath:-

1. I am a solicitor of this Honourable Court and a Principal at Tucker & Cowen Solicitors, the solicitors for the Respondent.

Signed: Witnessed by:

AFFIDAVIT:
Form 46, R.431

Filed on behalf of the Respondent

TUCKER & COWEN
Solicitors
Level 15
15 Adelaide Street
Brisbane, Qld, 4000.
Tele: (07) 300 300 00
Fax: (07) 300 300 33

SUPREME COURT OFFICE BRISBANE

2. I have responsibility for the conduct and carriage of this matter on behalf of the Respondent, and I am duly authorised to swear this Affidavit on the Respondent's behalf.

3. I refer to the affidavit of David Whyte sworn and filed on 29 May 2017 in this proceeding; that affidavit defined certain terms and expressions which I use below in this affidavit and which I intend will have the same meaning in this affidavit unless that is inconsistent with the context.

4. I refer to my Affidavit sworn and filed in this proceeding on 16 February 2017 ("**my February Affidavit**"), which exhibited certain correspondence between Russells (solicitors for the Applicants) and Tucker & Cowen (for the Respondent) in relation to this proceeding.

5. In the time since I made my February Affidavit, there has been further correspondence exchanged between Tucker & Cowen and Russells in relation to this proceeding and the Indemnity Application in particular. While much of that correspondence is not (in my view) relevant to the issues to be determined at the hearing of the Indemnity Application on 19 and 20 June 2017, I consider that some of it may be.

6. Exhibited hereto and marked "DHS-43" is a bundle containing copies of certain correspondence exchanged between Tucker & Cowen and Russells in connection with this matter, as described in the following table:-

Description of document		Date
(a)	Letter from Tucker & Cowen to Russells	11.05.2017
(b)	Letter from Russells to Tucker & Cowen (which enclosed the Applicants' Points of Defence and a transcript extract; the Points of Defence has not been exhibited to this affidavit, since it has been filed in this proceeding)	11.05.2017
(c)	Letter from Tucker & Cowen to Russells	16.05.2017
(d)	Letter from Russells to Tucker & Cowen	17.05.2017
(e)	Letter from Tucker & Cowen to Russells	19.05.2017

Signed: Witnessed by:

Description of document		Date
(f)	Letter from Russells to Tucker & Cowen	22.05.2017
(g)	Letter from Tucker & Cowen to Russells	24.05.2017
(h)	Letter from Russells to Tucker & Cowen	26.05.2017

7. All the facts and circumstances above 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 DAVID HEINER SCHWARZ on the 8th day of June 2017 at Brisbane in the presence of:

Deponent

Solicitor/~~A Justice of the Peace~~

Emma Susan Malloy
Solicitor

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS3508/2015

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

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CERTIFICATE OF EXHIBIT

Exhibit "DHS-43" to the Affidavit of DAVID HEINER SCHWARZ sworn this 8th day of June 2017

Deponent

Solicitor ~~/A Justice of the Peace~~

CERTIFICATE OF EXHIBIT:
Form 47, R.435

Filed on behalf of the Respondent,
Mr David Whyte
\\Tcsvrexch\data\RadixDM\Documents\MatterDocs\1602538\01363398-002.docx

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SUPREME COURT OF QUEENSLAND

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INDEX OF EXHIBIT "DHS-43"

	Description	Date	Page No.
(a)	Letter from Tucker & Cowen to Russells	11.05.2017	1 – 3
(b)	Letter from Russells to Tucker & Cowen (and enclosed transcript extract, but without points of defence)	11.05.2017	4 – 8
(c)	Letter from Tucker & Cowen to Russells	16.05.2017	9 – 14
(d)	Letter from Russells to Tucker & Cowen	17.05.2017	15 – 16
(e)	Letter from Tucker & Cowen to Russells	19.05.2017	17
(f)	Letter from Russells to Tucker & Cowen	22.05.2017	18 – 19
(g)	Letter from Tucker & Cowen to Russells	24.05.2017	20 – 21
(h)	Letter from Russells to Tucker & Cowen	26.05.2017	22 – 23

"DHS-43"

Tucker&CowenSolicitors.

TCS Solicitors Pty. Ltd. / ACN 610 321 509

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

Special Counsel.
Geoff Hancock.
Alex Nase.
Brent Weston.

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

Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady

11 May 2017

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

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

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*") – Indemnity Claim

We refer to our letter to you dated 12 April 2017 (copy enclosed for ease of reference).

We note that your clients have now had an opportunity to consider the Points of Claim, and the annexed draft Amended Statement of Claim in proceeding 11560/16.

Would you kindly let us know, by return correspondence, whether or not your clients are prepared to provide the assurances requested in our letter of 12 April 2017; namely, that:

1. your clients accept that our client has a proper and reasonably arguable basis for raising the matters the subject of the points of claim as grounds of objection to the indemnity claim by reason of the clear accounts rule; and

2. your clients formally withdraw the threat made on page 9 of 11 of your letter dated 13 December 2016.

We would be grateful if you would let us know whether your clients provide the requested assurances as soon as possible so that, in the event that the requested assurances are not forthcoming, our client can re-list the application for directions for hearing prior to the delivery of our client's affidavit material in opposition to your client's application, which is due by 19 May 2017.

We continue to reserve our client's right to seek the advice or direction of the Court if he considers it to be necessary.

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.

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Our reference: Mr Schwarz / Mr Ziebell

Your reference: Mr Tiplady

12 April 2017

COPY

Mr Ashley Tiplady
Russells Lawyers
Brisbane Qld 4000

Email: atiplady@russellslaw.com.au

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*") – Indemnity Claim

We refer to the review of this proceeding before Justice Jackson on Friday, 7 April 2017.

Our client acknowledges the suggestion made during the review by your clients' Counsel that, with the benefit of the Points of Claim, your clients will consider further whether they agree that the clear accounts rule is raised with a reasonable foundation and, consequently, that our client is acting properly in raising it. We understand that suggestion to be motivated by a concern that the costs associated with an application for directions (in the nature of judicial advice) not be unnecessarily incurred.

Our client appreciates the spirit in which that suggestion was made, and that it derives from a desire shared by our respective clients to minimise any unnecessary costs to the members of the FMIF in having these issues determined.

With that in mind, we have adjourned our client's application for directions to a date to be fixed, so that your clients may first have an opportunity to consider our client's points of claim, together with a draft Amended Statement of Claim in Supreme Court proceeding 11560/16.

In the event that your clients accept that our client has a proper and reasonably arguable basis for raising the matters the subject of the points of claim as grounds of objection to the indemnity claim by reason of the clear accounts rule, our client will request that your clients promptly confirm that position in writing, and that they formally withdraw the threat made on page 9 of 11 of your letter dated 13 December 2016.

If such assurances are forthcoming, then our client's application for directions may become unnecessary, although we reserve our client's rights to bring such an application if he considers it to be necessary to obtain the advice or direction of the Court for other reasons.

Of course, in the event that your clients consider themselves unable to provide that comfort, then our client will relist the application for directions.

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

Yours faithfully

per David Schwarz
Tucker & Cowen

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

RUSSELLS

11 May, 2017

Our Ref: Mr Tiplady
Your Ref: Mr Schwarz

Mr David Schwarz
Tucker & Cowen Solicitors
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BRISBANE 4000

email: dschwarz@tuckercowen.com.au

Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Mr David Whyte - Indemnity Claim

We refer to your correspondence of earlier today and also to your client's Amended Points of Claim filed 10 May, 2017.

We enclose, by way of service, our clients' Points of Defence.

Having now had the opportunity to reflect on your client's Amended Points of Claim, the Consolidated Particulars and the Draft Statement of Claim (which was attached), it is apparent that there is no allegation of impropriety made against our clients in their capacity as liquidators of LMIM. The payments in respect of which Mr Whyte complains, as alleged in paragraph 76 of the Consolidated Particulars, were made prior to LMIM being placed into liquidation (which occurred on 1 August, 2013). In these circumstances, there can be no application of the "clear accounts rule" as against the liquidators.

On this ground alone, there is no justification for your client withholding payment of the amounts claimed by the liquidators by reason of the "clear accounts rule". Mr Whyte should immediately cease resistance to payment on that ground.

Of further concern is the allegations contained in paragraph 76(e) of the Consolidated Particulars. When these allegations are drilled down upon, they also do not support the application of the "clear accounts rule" to the liquidators of LMIM. The entire "clear accounts rule" claim against the liquidators is now limited to three particular payments;

1. on 9 May, 2013 in the sum of $128,242.79;

2. on 14 June, 2013 in the sum of $276,441.22; and

3. on 8 July, 2013 in the sum of $214,426.40.

Of those three amounts, the first relates to the Resource Fee in respect of which no complaint has been made. The second and third payments were paid for the benefit of LM Administration Pty Ltd (Administrators Appointments). In these circumstances, any set off is with respect to different parties and cannot operate as a basis for Mr Whyte seeking to withhold payment of the liquidator's claims.

In this context, we also note the concession made by Ms Brown QC (as her Honour then was) before his Honour Justice Jackson on 14 March, 2016 at T:1-60, lines 34 to 39 and T:1-61, lines 35 to 38 (we enclose a copy of these passages). We are proceeding on the basis that the "clear accounts rule" is only pressed in respect of the acts of the liquidators; there is no mention made in the Points of Claim, Consolidated Particulars or the Draft Statement of Claim of any such acts. Is Mr Whyte now wishing to resile from the concession which was made in open court on express instructions?

In the circumstances, we invite Mr Whyte to withdraw his opposition to payment of the liquidators' indemnity claims on the basis of the "clear accounts rule"; it simply has no merit.

If Mr Whyte continues to press his opposition to making payment on that basis, the above facts (including the position outlined in our clients' Points of Defence) ought properly be disclosed to the Court in Mr Whyte's judicial advice application. Our clients take the view that should Mr Whyte not withdraw his opposition to payment of the indemnity claims, it is proper for the judicial advice application to proceed.

Of concern to our clients is the amount of the costs which have been incurred by all parties in dealing with this issue; being costs which will, no doubt, be sought from the members of the FMIF. It seems to us that the costs of both parties are already approaching (and may potentially have already exceeded) the amount sought in our clients' application. Naturally, as part of the judicial advice application, given the requirements set out in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, Mr Whyte will need to disclose to the Court the costs which he has incurred to date in dealing with this issue, and the costs which will likely be incurred in prosecuting not only the Points of Claim, but also the proceeding foreshadowed in the Draft Statement of Claim.

As Mr Whyte well knows, LMIM has no funds (or other assets) of its own. In this situation, there appears little benefit, even leaving to the side the circumstances outlined above (where the "clear accounts rule" does not apply to the liquidators' claims, where the only payments which have been identified predate the appointment of the liquidators and were, in any event, made to a different entity), in Mr Whyte pressing the point.

In the circumstances, Mr Whyte should immediately withdraw his opposition to payment of the amounts claimed in our clients' application based on the "clear accounts rule" and make payment forthwith.

Yours faithfully

Ashley Tiplady
Partner

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remuneration is established and as such on that basis your Honour could exercise your discretion to say, "Notwithstanding that there was constitutional provisions, I'm satisfied that the work carried out here does satisfy the equitable principles of Berkeley Applegate, or possibly Universal Distributors in so far as it's, I suppose, the care and preservation of assets and that they were the party who was charged with carrying out that work and at that time, there was no alternative, and that the parties accepted that that work's carried out for the benefit of the fund and therefore recourse could be had to the trust assets."

Post appointment, it is a different situation in terms of the exercise of the court's – well, both as a matter of principle and also as a matter of the court's exercise of discretion. The reason it's different as a matter of principle is as because, as we discussed before lunch, once Mr White was appointed to carry out the administration and realisation of the FMIF assets, there was an alternative to the applicants carrying out the work in terms of the trust. They were not the party that was primarily charged with carrying out the work in relation to the assets of the FMIF or for the care and preservation of those assets and there was an alternative open, which was obviously the fact that Mr White had been appointed in relation to that particular role and as such the prerequisites for the exercise of the equitable principles aren't satisfied in terms of the work which was carried out post appointment.

Now, in so far as it may be said, well, LMIM were still trustee, it still had a role, and it clearly did, and your Honour's decided that in terms of the residuary powers to a certain extent what the demarcation between those roles are. There's two points about that. The first point is that in so far as your Honour determined tasks – particular roles that should now be carried out by the LMIM, provision has been made for remuneration in that regard.

In relation to other tasks which could be said to be tasks which could be required to be carried out by them to the administration of the fund because of the fact they were a responsible – a responsible entity, there is provision, as we've discussed, under the constitution for them to be able to claim those expenses.

In terms of the question of the clear accounts rule and any setoff, I clarified the position over lunch in that regard, your Honour, and the only matter that would be raised as a point of setoff by any indemnity claimed by LMIM post appointment of the applicants would be in relation to conduct by them which could be said to be disentitling conduct for an indemnity.

HIS HONOUR: But what's that? That's a statement by you of some future attitude by Mr White?

MS BROWN: It's actually – it's – the only matter that has been raised has been identified in his affidavit, which is in relation to the loan management fees and that has been the subject of correspondence by Gaydens to Russells.

HIS HONOUR: But that's not what his affidavits have said. His affidavits have relied on the proposition in general twice, but you are now clarifying and you're saying that Mr White's intention is narrower?

MS BROWN: Yes.

HIS HONOUR: But that's not binding unless you're promising to be bound for him. You could be sued if he changes his mind. I mean, how am I supposed to pay any attention to that?

MS BROWN: Well, the point – the point about that, though, is this, your Honour: the pre-administration – pre-administration conduct would ultimately, in terms of creditors' claims, be dealt with under the 17 December 2015 regime. The claims by - - -

HIS HONOUR: But you're saying this should be not a remuneration claim by a liquidator which he or she seeks to have made payable out of a trust fund carried on by the company that was in liquidation, this should be dealt with under the constitution, meaning it should be a company claim, and that would be a claim subject to – however framed, to the rules about indemnities.

MS BROWN: It would, but as I said, your Honour, my – at least in terms of the conduct which could disentitle the first applicants from being able to claim their indemnity - - -

HIS HONOUR: But the first applicants don't have an indemnity under the hypothesis that it's going to be a company claim.

MS BROWN: Well, the company has the indemnity, you're right.

HIS HONOUR: Once you say it's done under the constitution, it's not some officer of the company, it is the company.

MS BROWN: It is the company, your Honour is quite right, and I can't take it further than the fact that – in terms of any setoff that would be claimed in terms of work carried out by the company post the appointment of the liquidators, that I'm instructed to say it would not be raised, other than in relation to conduct by them, but returning to the question of the remuneration application here, there is no general entitlement after Mr White's appointment to continue to carry out the work which Mr Park has referred to in his affidavit, and the requisite nexus between the administration of the trust and the work carried out which is required under any of the principles, whether it be under Suco Gold, Universal Distributorship or Berkeley Applegate, has not been established.

HIS HONOUR: But how do I deal with paragraph 23 of Mr Park's third affidavit where he swears to all this? I mean, Mr White says he's got concerns and here are reasons for it, and I understand the logic of that, but then Mr Parks says, "Well, I'm

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Our reference: Mr Schwarz / Mr Nase

Your reference: Mr Tiplady

16 May 2017

Mr Ashley Tiplady
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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 ("*Indemnity Application*")

We refer to your letter of 11 May 2017 and to your client's Points of Defence dated 11 May 2017 (filed on 12 May 2017).

There are a number of issues raised by your correspondence and by the Points of Defence. Of particular significance, it appears that your clients intend to advance indemnity claims by the First Applicants (Mr Park and Ms Muller) personally, either in addition to, or in the alternative to, a claim for indemnity by LMIM as responsible entity of the FMIF. That constitutes a significant change to the basis upon which the indemnity application is made, such that it is clear that further directions will be required in order for the application to progress expeditiously toward a hearing on 19 and 20 June 2017.

We address these issues below.

The nature of the Indemnity Application

1. Your letter refers to claims "*by the liquidators*" for indemnity, and asserts that the "clear accounts rule" has no application as against the liquidators. However, there is no claim by the First Applicants for indemnity from the FMIF presently before the Court.

2. The application filed on 20 May 2016 ("**the Indemnity Application**") arises out of the Order of 17 December 2015, by which Jackson J provided for a regime by which the First Applicants was directed to identify claims by LMIM for indemnity from the property of the FMIF, and our client was directed to respond to those claims. Relevantly, your clients made certain claims which our client rejected ("**the Disputed Claims**"), in light of which the Indemnity Application seeks:-

   (a) By paragraph 1, a declaration that certain items are "Eligible Claims" within the meaning of paragraph 8(b) of the Order of 17 December 2015, "*for which LMIM has a right to be indemnified from the property of the…Fund*"; and

(b) By paragraph 2, an order for payment of such sum, "*as is declared to be an Administration Indemnity Claim or Recoupment Indemnity Claim for which LMIM has a right to be indemnified from the property of the Fund...*".

3. The Indemnity Application does not seek any orders concerning any claim for indemnity by the First Applicants, Mr Park and Ms Muller (the liquidators and former administrators of LMIM), nor does it refer to an indemnity in favour of the First Applicants.

4. The correspondence between our respective firms since the filing of the Indemnity Application has proceeded on that footing. For example (by no means exhaustively):-

(a) Your letter of 25 May 2016, which enclosed the Indemnity Application begins, "*Please find enclosed, by way of service and pursuant to paragraph 9(a) of the Order an application regarding your client's rejection of certain claims for indemnity out of the assets of the FMIF.*";

(b) Our letter of 23 November 2016 referred to the "clear accounts rule" and its application to "*LMIM's indemnity from the FMIF*" and, earlier, "*indemnity claims by LMIM*"; and

(c) In our letter of 3 February 2017, we explained at length our client's understanding, and ours, of the Indemnity Application; in that letter, we said:-

"*... As we understand the Indemnity Application, however, the application concerns only LMIM's right of indemnity, and does not in its terms purport to seek any directions or orders at all concerning any indemnity in favour of Mr Park and Ms Muller personally.*

We pause at this point to note that, while the Indemnity Application seeks declarations as to LMIM's right of indemnity for certain amounts (being amounts that Mr Whyte rejected) under paragraphs 4 and 5 of the Order of the Honourable Justice Jackson dated 17 December 2015 ("the December Order"), your clients' Indemnity Application is (as we understand it) in fact for directions as contemplated by paragraph 9 of the December Order.

If our understanding is incorrect, please tell us."

5. As a result, our client's Points of Claim in respect of the grounds of objection based upon the 'clear accounts' rule was prepared on the basis that the Indemnity Application seeks orders concerning an indemnity claimed only by the Second Applicant, LMIM.

6. Nonetheless, it appears, from the Points of Defence filed on 12 May 2017, that your clients now intend to seek an indemnity directly in favour of the First Applicants. So much is clear from the various references to a claim for indemnity in favour of the First Applicants, throughout the Points of Defence; for example at paragraphs 10(d) and (e), 24, 25(c) and (e), 26(i) and 27. In particular by paragraphs 27(a) and (h) it is said that:-

"(a) the First Applicants, as liquidators, may claim their costs and expenses the subject of the Applicants' Application filed 20 May 2016 ("Application") by direct recourse against the trust funds of the FMIF in accordance with the principles set out in Re Owen and Others (2014) 225 FCR 541 at pages 549 to 552."

"(h) There is no scope for the application of the clear accounts rule as against the First Applicants and the Respondent's uncertainty about the state of account between LMIM and the FMIF, as expressed in paragraph 23 of the Points of Claim, is irrelevant to the First Applicants' claims."

7. Those allegations bring into stark focus the significance of the difference between the Indemnity Application as it currently stands, and the approach which your clients now appear to seek to take to recover the expenses the subject of the Disputed Claims.

8. If, further or in the alternative to the claim by LMIM to an indemnity from the scheme property of the FMIF, your clients now intend to seek an exercise of the Court's inherent jurisdiction to permit a direct indemnity in favour of the First Applicants personally for expenses or liabilities which they have personally incurred, then your clients ought to seek to amend their application, and they should do so promptly.

9. Consequential directions will also be required in order that appropriate evidence is put before the Court as to the basis for any indemnity sought by the First Applicants personally, and in order that our client is afforded an appropriate opportunity to respond to such an application.

10. We return to this issue further below.

Grounds of our client's opposition to the Indemnity Application

11. Your letter appears to assume that our client, Mr Whyte, resists your client's Indemnity Application only on grounds based upon the "clear accounts" rule.

12. That is not, however, the case. There are two bases upon which Mr Whyte opposes the Indemnity Application, namely:-

    (a) first, because Mr Whyte does not consider that the claims the subject of the Indemnity Application are properly to be regarded as expenses for which LMIM is entitled to an indemnity from the assets of the FMIF; the reasons for that were given by Mr Whyte in his notice of rejection of the relevant claims; and

    (b) second, Mr Whyte relies upon the "clear accounts" rule, as pleaded in the Points of Claim filed on 24 April 2017.

13. Mr Whyte has never resiled from his view that the expenses claimed by the Indemnity Application are not expenses for which LMIM is entitled to an indemnity from the assets of the FMIF. Accordingly, even setting to one side the application of the clear accounts rule, Mr Whyte would not be in a position to accede to your request that the claimed amounts be paid out of the assets of the FMIF.

Other issues

Distinction between administrators and liquidators

14. Your letter notes that no allegation of impropriety is made against your clients (Mr Park and Ms Muller, the First Applicants) personally in their capacity as liquidators of LMIM, and then asserts that, "*In these circumstances, there can be no application of the 'clear accounts rule' as against the liquidators.*"

15. Your letter refers elsewhere (for example, at the foot of page 2) to "*The only payments which have been identified predate the appointment of the liquidators*".

16. It thus appears to be suggested that Mr Whyte is not in a position to raise the clear accounts rule in respect of payments made from the property of the FMIF during the period of the appointment of Mr Park and Ms Muller as administrators of LMIM, in answer to claims made at the instigation of Mr Park and Ms Muller as liquidators of LMIM.

17. We do not see why that would be the case. If there is some principle of law or equity upon which you rely in that respect, please let us know.

Alleged inconsistency in Mr Whyte's position

18. Your letter further seems to assert that the position taken by Mr Whyte previously was to the effect that he would only raise acts of Mr Park and Ms Muller personally in their capacity as liquidators of LMIM (as distinct from in their capacity as administrators of LMIM) as grounds for opposition to your clients' claim for indemnity, based upon the clear accounts rule.

19. That is not the case, and never has been.

20. Your letter refers to the transcript of the hearing before Justice Jackson on 14 March 2016, and suggests the exchange between Ms Brown QC (as Her Honour then was) and His Honour was to the effect that Mr Whyte's position was that the "clear accounts rule" is only pressed in respect of the acts of the liquidators (in their capacity as liquidators). As to that:-

(a) First, the exchange between Ms Brown QC and His Honour must necessarily be taken in context. For example, at the foot of T1-60, where Ms Brown said, "*The only matter that has been raised has been identified in his affidavit, which is in relation to the loan management fees and that has been the subject of correspondence by Gadens to Russells.*" Those loan management fees are the same fees as are identified in the Points of Claim.

(b) At T-1-61, line12, Ms Brown QC referred to "*pre-administration conduct*" during the exchange.

(c) Mr Whyte's position was further explained in our letter of 3 February 2017, in which the following was said (on page 7 of that letter):-

> "*Mr Whyte therefore considers that it would be reasonable and appropriate that a distinction be drawn between liabilities incurred before the appointment of your clients, the liquidators, to LMIM and those incurred after; and that, in respect of claims for indemnity by your clients in connection with liabilities by them incurred after their appointment, only liabilities 'to the FMIF' arising from transactions, acts or omissions of your clients after the appointment of the liquidators (first as administrators) should be set off against the indemnity claim.*"

It is therefore perfectly clear that, in referring to Mr Park and Ms Muller as "the liquidators", we intended that the reference encompass your clients' roles both as liquidators and, formerly, as the administrators of LMIM.

(d) Finally, it was acknowledged both in the exchange with His Honour and in our letter of 3 February 2017, that if the claim for indemnity is made by LMIM as responsible entity, then that would necessarily be a claim subject to "*the rules about indemnities*" (as His Honour referred to them) and, for that reason, Mr Whyte's position is "*a matter about which our client considers that judicial guidance is likely required.*" (as was said in our letter of 3 February 2017, on page 7).

21. Furthermore, as we explained in our letter of 3 February 2017, although our client's view as to what would be a reasonable and appropriate position is as we have repeated above, nonetheless we noted that "Jackson J appeared to

express some doubt as to whether Mr Whyte could adopt such a position" and, consequently, that the general position "may be wider than Mr Whyte intends".

22. There should not be any confusion as to the position of Mr Whyte. To be clear, the grounds upon which Mr Whyte relies as giving rise to an objection to the indemnity by reason of the clear accounts rule, are stated in the Points of Claim.

Relevance of payments made to LMA, not LMIM

23. Both your letter and the Points of Defence refer to the second and third payments mentioned in your letter as having been paid "*for the benefit of LM Administration Pty Ltd (administrators appointed* (sic))." Your letter asserts that "*Any setoff is with respect to different parties and cannot operate as a basis for Mr Whyte seeking to withhold payment of the liquidator's claims.*"

24. A similar point appears to be made in paragraph 27(f) of the Points of Defence, where it is alleged that the Post Administration Appointment Payments were paid "*to or for the benefit of LMA and not LMIM*".

25. We do not understand the point. The payments were made from the property of the FMIF, and were effected by LMIM as the responsible entity. That being the case, if it be established that the payments were not properly made (in the relevant sense) or were made in breach of trust, then we fail to see why a claim would not lie as against LMIM in respect of the loss caused to the FMIF arising from the making of those payments.

26. We invite you to explain the relevance of payments having been made to LMA, rather than to LMIM, to the question of whether a claim lies as against LMIM for breach of trust with respect to those payments.

Further conduct of the Indemnity Application

27. In regards then to your clients' apparent intention to change the footing upon which the Indemnity Application is made, we ask that you confirm to us, as a matter of urgency, the following:-

(a) Whether your clients intend to seek orders for an indemnity directly in favour of the First Applicants from the assets of the FMIF, in respect of the amounts claimed by the Indemnity Application; and

(b) If so, whether your clients intend that the Second Applicant, LMIM, maintains a claim for indemnity from the assets of the FMIF in addition to, or as an alternative to, any claim for indemnity by the First Applicants.

28. In other words, is the application to be treated now as an application for indemnity only by the First Applicants, or as an application for indemnity by either or both of the First Applicants and the Second Applicant?

29. This is an issue requiring prompt resolution. It will necessarily affect the way in which our client prepares for the hearing of the Indemnity Application, and the steps that are required to be taken by all parties to prepare for that application.

Request for proposed directions

30. In the circumstances, it is appropriate that further directions be made for the conduct of the Indemnity application.

31. It is highly desirable to have all issues concerning the claims for indemnity, the subject of the Indemnity Application, determined expeditiously, and with a minimum of expense. While there is a relatively short time remaining until the hearing of the Indemnity Application, our client considers that if your clients' position is clearly stated now, and if steps are taken promptly to ensure that all relevant evidence is before the Court to enable all of the real issues in dispute to be identified, considered and determined by the Court, then the hearing dates in June may yet be retained.

32. As a first step, your clients must necessarily clarify the basis or bases on which they seek an indemnity and, if necessary, seek leave to make appropriate amendments to the Indemnity Application.

33. Thereafter, and if your clients do intend to seek an indemnity directly in favour of the First Applicants, directions will be required for further evidence to be filed and served by your clients, evidence in response to be filed and served by our client, and for our client to be afforded an opportunity to amend his Points of Claim. No doubt your clients will then desire an opportunity to make any necessary amendments to the Points of Defence in order to respond to any fresh allegations made in the Further Amended Points of Claim.

34. It will be evident, of course, that the current directions (requiring our client to file affidavit material by Friday this week, 19 May 2017) ought to be vacated.

35. Could you please let us know as a matter of urgency what your clients propose as regards further directions, assuming that your clients do intend to amend their application to seek an indemnity directly in favour of the First Applicants.

36. Finally, we also note that the clarification of your clients' position, and the amendment of the Indemnity Application, is a necessary precursor to our client seeking judicial advice from the Court as to whether he is justified in raising grounds of objection based upon the clear accounts rule in response to your clients' application.

Conclusion

Please let us have your response to the issues raised above as soon as possible.

In particular, please respond to the questions asked at paragraphs 27 and 28 above, and let us know what directions your clients propose, by **5pm tomorrow, 17 May 2017.**

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

Yours faithfully

David Schwarz
Tucker & Cowen

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RUSSELLS

17 May, 2017

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Your Ref: Mr Schwarz

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Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Mr David Whyte - Indemnity Claim

Thank you for your letter dated 16 May, 2017.

We confirm that the claim is pressed primarily as an indemnity claim under the regime set out in the Order of Jackson J dated 17 December, 2015. The sums claimed are Administration Indemnity Claims under the Order. In circumstances where the liquidators have incurred the expenses, they have a claim in any event personally against the Fund. The claim by the liquidators personally is a claim which arises as a matter of law and without the need to rely on further evidence than as set out in the material already filed.

The claim by the liquidators is made in circumstances where your client articulated his reliance on the "clear accounts" rule as against LMIM on 9 May, 2017 by the provision of the particulars of the sums that he says give rise to the operation of that rule. As we have noted, those payments were not made by the liquidators, and therefore cannot be relevant to the liquidators' current claim, as set out in the Points of Defence. Given that the matters raised are matters of law, we do not consider that amendment of the Application filed 20 May, 2016 is necessary; your client is well aware of the arguments, given that they were also canvassed in the liquidators' Application for Remuneration currently reserved before his Honour.

In response to your paragraph 27, we confirm that our clients do not seek to be paid twice for the same claim.

Given that the point raised on behalf of the liquidators is a matter of law, arising from the existing affidavit material, there is no reason to postpone your client's evidence in relation to his reliance on the "clear accounts" rule. We insist, respectfully, on compliance with the Order for provision of the affidavit material by this Friday. Your client has been investigating the matters of the loan management fees since, at least, 22 October, 2014. There are only three payments particularised by him. He must by now be able to identify the relevant documents concerning those three payments. The costs of both parties associated with any further delay or a further directions hearing would not seem to be a prudent expenditure of the funds of the FMIF.

There are a number of matters raised in your letter that we have not addressed in our response; in part because you requested an urgent response and in part because the costs of engaging in lengthy correspondence with you is not in the interests of the members of the Fund.

Yours faithfully

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19 May 2017

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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 ("*Indemnity Application*")

We refer to the above matter and to the Orders of Justice Jackson dated 7 April 2017.

Unfortunately, our client will not be in a position to deliver his Affidavit material today. We anticipate that our client will be in a position to deliver his Affidavit material next week.

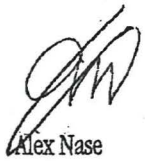
This short delay will not cause any prejudice to your clients.

Our client has relisted his application for directions filed 15 March 2017 for hearing on 30 May 2017.

We understand, based on your letter dated 17 May 2017, that your clients do not propose to amend their Application.

Accordingly, our client is proceeding on the basis that the application to be heard and determined on 19 and 20 June 2017 is the Application as currently made, that is, that your clients are seeking orders for an indemnity in favour of LMIM and not the Liquidators personally.

Yours faithfully



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RUSSELLS

22 May, 2017

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Dear Colleagues

LM Investment Management Limited (In Liquidation)(Receivers Appointed) ("LMIM")
Park & Muller and LMIM as Responsible Entity of the LM First Mortgage Income Fund ("FMIF") v Mr David Whyte - Indemnity Claim

Thank you for your letter of 19 May, 2017.

In response to the last paragraph in your letter, our clients' position is that the claimed right of indemnity is being pressed by LMIM and also the liquidators. Your client should proceed on that basis. So much was made clear in our correspondence to you of 17 May, 2017 (copy enclosed).

In that letter, we also queried the jurisdictional basis upon which your client has sought the directions in the application which is now listed for hearing on 30 May, 2017.

Would you please let us know on what basis you say that the Court has the power to make the orders which your client has sought. If the jurisdictional basis relied upon by Mr Whyte is the directions power set out in the order of Jackson J of 17 December, 2015, then our clients are properly parties.

That being said, we are not suggesting that our clients will necessarily appear at the hearing, as Jackson J has made it very clear that there should not be a duplication of contested hearings. Rather, we raise this issue now to avoid any future delays if your client decides at the hearing on 30 May, 2017 that they wish to proceed *ex parte*, but in reliance on a direction, power or order to which our clients are parties.

We look forward to hearing from you in this regarding by 4:00pm on Tuesday, 23 May, 2017.

Yours faithfully

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24 May 2017

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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 ("*Indemnity Application*")

We refer to your letter of 22 May 2017, received by email at approximately 4:32 p.m.

Nature of the Application

You have said in your letter that, "*the claimed right of indemnity is being pressed by LMIM and also the liquidators.*"

We pointed out in our letter of 16 May 2017 that the Indemnity Application itself is plainly concerned with LMIM's own indemnity from the FMIF, and not with any claim for indemnity by the liquidators personally. Your recent correspondence may assert otherwise, but the Indemnity Application itself is the application to be heard by the Court on 19 and 20 June 2017, and the application that our client is preparing to meet.

If your clients intend to press a claim for indemnity in favour of the liquidators personally, then we reiterate what was said at paragraphs 8 and 9, and 29 to 36 of our letter of 16 May 2017.

As noted above, our client is preparing to meet the Indemnity Application as filed, being the application filed 20 May 2016.

Jurisdictional basis for the Application for directions filed 9 March 2017 ("Directions Application")

By the Directions Application our client, Mr Whyte, is seeking judicial advice and direction from the Court, in the Court's inherent jurisdiction to give such advice to its appointed receiver.

You will recall that this is the jurisdiction that was relied upon by Mr Whyte on the hearing of his Application filed 4 September 2014, before Justice Jackson on 15 September 2014. You will recall that His Honour gave reasons for making the Order on that day, which included that:-

> "*In any event, there's little doubt that a Court appointed receiver has the entitlement to apply to the Court for directions as to the exercise of powers on the footing that he is an officer of the Court, and the authorities referred*

to in the outline of argument or submissions which have been filed on Mr Whyte's behalf demonstrate that well enough."

While the Directions Application refers to paragraph 10 of the Order of Jackson J made 17 December 2015, and to paragraph 7 of the Order of Jackson J made 16 February 2017, the jurisdictional footing of the Application is as explained above.

We think, too, that it was clear from the exchanges between His Honour and Counsel for each of the parties (at various times) when the matter was reviewed by His Honour both on 16 February 2017 and on 7 April 2017, that it was contemplated that it is the Court's inherent jurisdiction to give advice to a Court-appointed receiver that would be invoked upon the hearing of the Directions Application.

In that respect, we had not understood the fact that those orders confer liberty to our client to apply for directions in connection with his response to the Application, to require that such an application for directions join your clients as respondents, rather than (as has been done) our client giving notice of the Application to your clients as interested parties (but not joining them as respondents or formally serving them).

In order to avoid any potential ambiguity about that, we are instructed to amend the Directions Application by removing reference to the Orders of 17 December 2015 and 16 February 2017. An amended application will be filed at or before the hearing on 30 May 2017.

Yours faithfully

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RUSSELLS

26 May, 2017

Our Ref: Mr Tiplady
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Dear Colleagues

In the matter of LM Investment Management Limited (in liquidation) (receivers and 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 Number BS3508 of 2015

Thank you for your correspondence of 25 May, 2017 received by email from your Mr Schwarz at 6:23pm.

As we outlined in our letter of 22 May, 2017 our clients will be pressing the liquidators' personal claim for an indemnity as part of the "Indemnity Application". In our view, there is no need to amend our clients' Application in the circumstances where this is a matter of law.

The Court should be informed if, and when, your client makes the "Directions Application" that this is one of the bases for our clients' claimed to right of indemnity from the assets of the FMIF (as detailed in our clients' Points of Defence).

Thank you for clarifying the jurisdictional basis for your client's Directions Application. We look forward to receiving the Amended Application from you shortly. We pass no comment on whether that is a sound foundation for the making of the orders sought by your client.

Our clients wished to ensure that the Directions Application was not brought under an order or pursuant to the Jackson J "regime" flowing from the Order made on 17 December, 2015 which would see them bound by any determination. In circumstances where you have indicated that the basis for the Application is the Court's inherent power, we have taken the view that our clients need not appear on the Directions Application as they will not be bound by the decision.

Your client's affidavit material in respect of the Indemnity Application was due on Friday, 19 May, 2017. We are yet to receive it. Would you please let us have these affidavits as a matter of urgency.

Yours faithfully

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