SUPREME COURT OF QUEENSLAND

CITATION:	*Park & Muller (liquidators of LM Investment Management Ltd) v Whyte No 3* [2017] QSC 230
PARTIES:	**JOHN RICHARD PARK AND GINETTE DAWN MULLER AS LIQUIDATORS OF LM INVESTMENT MANAGEMENT LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) ACN 077 208 461 THE RESPONSIBLE ENTITY OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** **(**first applicants) AND **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** (second applicant) AND **DAVID WHYTE AS THE PERSON APPOINTED TO SUPERVISE THE WINDING UP OF THE LM FIRST MORTGAGE INCOME FUND ARSN 089 343 288** (respondent)
FILE NO/S:	BS3508/15
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	17 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	19 & 20 June 2017
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The first applicants are entitled to be paid the following sums from the property of the LM First Mortgage Income Fund by way of indemnity for expenses:** **(a) the appropriate proportion of the sum of $80,125 for insurance premiums;** **(b) the appropriate proportion of the sum of $25,480.43 for legal costs related to the production of books and records;**

(c) the sum of $11,477.43 for legal costs of the assessment of legal costs;

(d) the sum of $6,279.86 for assessor's costs of the assessment of legal costs.

2. The first applicants and the respondent may submit a draft order in agreed amounts in accordance with these reasons as to the first applicants' entitlement to be paid from the LM First Mortgage Income Fund ("FMIF") for the expenses referred to in paragraph 1.

3. If the parties are unable to reach agreement under paragraph 2 two business days before 22 November 2017, the matter is relisted on that date for further hearing or directions.

4. The parties should exchange submissions on costs two business days before 22 November 2017.

5. The question of costs and any outstanding questions under these orders be heard on 22 November 2017 at 10 am.

CATCHWORDS: CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the second applicant was the responsible entity of a number of registered investment schemes – where the first applicants were appointed administrators and later liquidators of the second applicant – where the respondent was appointed by order to take responsibility for ensuring that the largest registered investment scheme was wound up in accordance with its constitution and the order – where the first applicants made claims for expenses for legal costs, assessors costs and insurance premiums incurred in the liquidation of the second applicant – whether the first applicants' expenses were reasonably incurred and should be paid from the trust property of the registered investment scheme

CORPORATIONS – MANAGED INVESTMENTS – WINDING UP – where the second applicant was the responsible entity of a number of registered investment schemes – where the first applicants were appointed administrators and later liquidators of the second applicant – where the respondent was appointed by order to take responsibility for ensuring that the largest registered investment scheme was wound up in accordance with its constitution and the order – where the first applicants made claims for indemnity for expenses for legal costs, assessors costs and insurance premiums incurred in the liquidation of the second applicant – where the respondent alleged that the second applicant's claims for indemnity should be set off against a number of potential claims against the second

respondent for breaches of trust or duty – where the first applicants argued they had a right of direct payment of the indemnity amounts from the trust property to which such a set off would not apply – whether any successful indemnity claims by the first applicants should be reduced by the amount claimed against the second applicant

Australian Securities and Investments Act 2001 (Cth), s 33
Corporations Act 2001 (Cth), s 601FC, 601FH, s 601GA, s 601NF, s 1284
Trusts Act 1973 (Qld), s 72
Uniform Civil Procedure Rules (Qld), r 700

Adsett v Berlouis (1992) 37 FCR 201, cited
Alsop Wilkinson v Neary [1996] 1 WLR 1220, discussed
Australian Incentive Plan Pty Ltd v Attorney-General for Victoria (No 2) (2012) 44 VR 661, discussed
Australian Securities and Investment Commission (ASIC) v Letten (No 17) (2011) 286 ALR 34, discussed
Berkeley Applegate (Investment Consultants) Ltd (in liq) [1989] Ch 32, applied
Bruce & anor v LM Investment Management Ltd & ors (No 2) [2013] QSC 347, cited
Bruce & anor v LM Investment Management Ltd & ors [2013] QSC 192, discussed
Cherry v Boultbee (1839) 4 My & Cr 442, discussed
Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq) (2003) 7 VR 287, cited
Goldberg v Ng (1995) 185 CLR 83, cited
Hearne v Street (2008) 235 CLR 125, cited
Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141, cited
Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld) [1984] 1 Qd R 576, cited
Kirwan v Cresvale Far East Ltd (2002) 44 ACSR 21, distinguished
LM Investment Management Ltd (in liq)(recs and mgrs apptd) v Bruce (2014) 102 ACSR 481; [2014] QCA 136, discussed
Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66, cited
Miller v Cameron (1936) 54 CLR 572, discussed
Nolan v Collie (2003) 7 VR 287, cited
Owen v Madden (No 5) (2013) 9 BFRA 99, cited
Primary Securities Ltd v Willmott Forests Limited (recs & mgrs apptd)(in liq) [2016] VSCA 309, discussed
Re Beddoe; Downes v Cottam [1893] 1 Ch 547, discussed
Re Biposo Pty Ltd; Condon v Rogers (1995) 17 ACSR 730, distinguished
Re JF Fitzgerald and Seymour's Bill of Costs [1960] Qd R

430, cited
Re Kaupthing Singer and Friedlander [2012] 1 AC 804, cited
Re Obie Pty Ltd [1984] 1 Qd R 371, cited
Re Suco Gold Pty Ltd (in liq) (1983) 33 SASR 99, discussed
Re the Earl of Radnor's Will Trusts (1890) 45 Ch D 402, discussed
Re Universal Distributing Company Ltd (in liq) (1933) 48 CLR 171, discussed
Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R 439, cited
RWG Management Ltd v Commissioner for Corporate Affairs [1985] VR 385, applied
Sons of Gwalia Ltd v Margaretic (2006) 232 ALR 119, cited
Stewart v Atco Controls Pty Ltd (in liq) (2014) 252 CLR 307, discussed
Stuart, Re; Johnson v Williams [1940] 4 All ER 80, cited
Wales v Wales (No 3) [2015] VSC 151, distinguished
Warne v GDK Financial Solutions Pty Ltd; Billingham v Parberry [2006] NSWSC 259, approved

COUNSEL: J Peden for the applicants
J McKenna QC and D Ananian-Cooper for the respondent

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

[1] **Jackson J**: This is another application for orders that the first applicants, Mr Park and Ms Muller, as liquidators of the second applicant ("LMIM") or LMIM as responsible entity of the registered managed investment scheme known as the First Mortgage Investment Fund ("FMIF") be paid amounts from the property of the FMIF.

Expenses application

[2] The basis of the application is that the applicants are entitled to an indemnity from the FMIF for those amounts as expenses. That distinguishes the present application from the related application between the same parties for orders relating to remuneration and some other expenses which, for brevity, I have called the "Remuneration application".

[3] The coincidence between the circumstances of the two applications is such that the findings made in the Remuneration application are relevant here. I will not repeat them or set them out in full in these reasons, except to the extent appropriate to render these reasons intelligible.

Background facts

[4] I incorporate paras [6] – [33] of my reasons for judgment on the Remuneration application into these reasons.

Mr Whyte's role in the present application

[5] Mr Whyte is involved in the present application under orders I made on 17 December 2015. I determined that the first applicants as liquidators of LMIM should ascertain the creditors of LMIM for whose debts it may be entitled to an indemnity from the property of the FMIF. I directed that the liquidators should notify Mr Whyte as the receiver of the property of the FMIF and person appointed under s 601NF(1) of the *Corporations Act* 2001 (Cth) ("CA") to ensure the winding up of the FMIF is carried out in accordance with its constitution and the orders of the court. If Mr Whyte rejected the applicants' entitlement to indemnity from the assets of the FMIF, the orders provided for the question of indemnity to come before the court for decision. These orders were made in exercise of the court's powers under s 601NF(2) of the CA in the winding up of the FMIF.

Summary of claims for payment of expenses

[6] The applicants break up their claims into five categories,[1] although there are some subsets within some of the categories. They are summarised in the following table:

Category Number	Description	Amount
1	Legal costs of appeal 8895 of 2013	$263,127.13[2]
2	Liability insurance premiums	$61,391.78
3	Legal costs relating to production of books and records	$25,480.42
4	Legal costs relating to assessment of legal costs	$20,776.37
5	Assessors costs	$15,348.54[3]
Total		**$360,650.82**

[7] The claims for indemnity are presented on alternative bases. First, LMIM claims the amounts as expenses incurred by it as responsible entity and trustee of the FMIF ("LMIM's indemnity claims"). Second, the first applicants alternatively claim direct payment of the same amounts as expenses incurred by them as liquidators of the second applicant ("liquidators' direct payment claims"). Both bases of claim are advanced for an order for payment of the amounts from the property of the FMIF.

Summary of Mr Whyte's opposition

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1 I note also that invoices for fees of $7,399.84 that were incurred in a separate matter file numbered 2013259 were tendered in evidence, but no separate submissions were directed to the invoices for that matter, although they were dealt with under the heading of "The Right to Indemnity" in paras 42 to 49 of Mt Park's first affidavit.

2 This amount is the initially claimed amount for those costs of $241,453.54 less the costs of the assessment of the costs of the appeal included in that sum of $9,068.68 plus the omitted amount of further legal costs related to the appeal in the sum of $30,742.27.

3 This amount is the initially claimed amount of $6,279.86 plus the costs of the assessment of the costs of the appeal in the sum of $9,068.68.

[8] Mr Whyte opposes LMIM's indemnity claims and the first applicants' direct payment claims.

[9] First, there are separate questions raised about each category of claim. The parties dispute the legal standard involved and the factual inferences to be drawn, but they begin from the common ground that a relevant expense must be properly incurred before any entitlement to an indemnity arises. Mr Whyte opposes LMIM's indemnity claims and the liquidators' direct payment claims on the ground that the relevant expenses were not properly incurred.

[10] Second, Mr Whyte opposes LMIM's indemnity claims on the ground that LMIM as trustee is liable to restore the trust fund of the FMIF for losses suffered by breaches of trust or duty as responsible entity of the FMIF and that the equitable principle known as the "clear accounts rule" requires that LMIM must give credit for the amount of that liability before it is entitled to payment of any amount upon LMIM's indemnity claims.

Statutory framework for expenses

[11] For a trust subject to the law of this state, the trust instrument may expressly provide for the trustee to be indemnified by recoupment or exoneration of expenses.

[12] Section 72 of the *Trusts Act* 1973 (Qld) ("TA") provides that:

> "[a] trustee may reimburse himself or herself for or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers."

[13] Section 601GA(2) of the CA provides:

> "(2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
>
> (a) must be specified in the scheme's constitution; and
>
> (b) must be available only in relation to the proper performance of those duties;
>
> and any other agreement or arrangement has no effect to the extent that it purports to confer such a right."

[14] Section 601FH of the CA provides, in part

> "If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:
>
> (a) …
>
> (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed."

[15] As the responsible entity of the FMIF, LMIM is a trustee of the trust property of the fund.[4] Under the constitution of the fund and the law of trusts, it has a potential entitlement to indemnity for expenses. However, a responsible entity's right to be paid "out of scheme property for liability or expenses" must be specified in the scheme's constitution.

Constitution of the FMIF

[16] Clause 18.5 of the constitution of the FMIF provides:

> "The RE shall be indemnified out of Scheme Property for liabilities or expenses incurred in relation to the performance of its duties, including;
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> (a) auditor's fees;
> (b) legal fees and outgoings in relation to settlement, rollover, default or recovery of loans;
> (c) barrister/QC - legal counsel fees;
> (d) search fees including property searches, company, bankruptcy, CRAA searches and any other searches which may be necessary to enable location, identification and/or investigation of borrowers/guarantors/mortgagors;
> (e) valuation fees;
> (f) independent expert's or consultant's fees including but not limited to marketing agents, property specialists, surveyors, quantity surveyors, town planners, engineers;
> (g) property report/property consultant fees;
> (h) process servers' fees;
> (i) private investigator fees;
> (j) fees in relation to the marketing and packaging of security properties for sale;
> (k) real estate agent's-sales commissions;
> (l) costs of maintenance of mortgage securities;
> (m) outstanding accounts relating to mortgage securities such as council rates;
> (n) locksmith for changing locks of mortgage securities as appropriate;
> (o) insurance (property and contents);
> (p) removalists for removal of borrower's property as appropriate;
> (q) security guards to attend mortgage securities as appropriate;
> (r) building and/or property inspection report fees - i.e. building, town planning experts and the like;
> (s) all ASIC charges;
> (t) all costs of supplying Members with copies of this Constitution and any other documents required by the Law to be provided to Members;
> (u) all costs and expenses incurred in producing PDS and Supplementary PDS or any other disclosure document required by the Law;
> (v) reasonable costs incurred in protecting or preserving all assets offered as security;
> (w) all liability, loss, cost, expense or damage arising from the proper performance of its duties in connection with the Scheme performed

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4 *Corporations Act* 2001 (Cth), s 601FC(2).

by the RE or by any agent appointed pursuant to s 601FB(2) of the Law;

(x) any liability, loss, cost, expense or damage arising from the lawful exercise by the RE and the Custodian of their rights under the Power of Attorney contained in clause 20;

(y) fees and expenses of any agent or delegate appointed by the RE;

(z) bank and government duties and charges on the operation of bank accounts;

(aa) costs, charges and expenses incurred in connection with borrowing money on behalf of the Scheme under the Constitution;

(bb) insurances directly or indirectly protecting the Scheme Property;

(cc) fees and charges of any regulatory or statutory authority;

(dd) taxes in respect of the Scheme but not Taxes of the RE [save and except any goods and services or similar tax (GST)] which are payable by the RE on its own account;

(ee) costs of printing and postage of cheques, advises, reports, notices and other documents produced during the management of the Scheme;

(ff) expenses incurred in connection with maintaining accounting records and registers of the Scheme and of the Scheme Auditor;

(gg) costs and disbursements incurred in the preparation and lodgement of returns under the Law, Tax Act or any other laws for the Scheme;

(hh) costs of convening and holding meetings of Members;

(ii) costs and disbursements incurred by or on behalf of the RE in connection with its retirement and the appointment of a substitute;

(jj) costs and disbursements incurred by the RE in the initiation, conduct and settlement of any court proceedings;

(kk) costs of any insurance premiums insuring against the costs of legal proceedings (whether successful or not) including legal proceedings against Compliance Committee Members not arising out of a wilful breach of a duty referred to in S601 JD of the Law;

(ll) costs of advertising the availability of funds for lending;

(mm) brokerage and underwriting fees;

(nn) if and when the RE becomes responsible to pay any GST in respect of any services provided to the Scheme or any payments in respect of GST to be made by the Members or the RE in respect of the Scheme or under the terms of this Constitution then the RE shall be entitled to be indemnified in respect of such GST from the Scheme Property;

(oo) if there is any change to the Law or ASIC policy whereby the RE is required to alter the structure of the Scheme or amend this Constitution, then the costs of the RE in complying with these changes will be recoverable out of the Scheme Property."

[17] Clause 19 of the Constitution of the FMIF further provides:

"19.1 The following clauses apply to the extent permitted by law:

(a) The RE is not liable for any loss or damage to any person (including any member) arising out of any matter unless, in respect of the matter, it acted both:

(i) otherwise than in accordance with the Constitution and its duties; and

(ii) without a belief held in good faith that it was acting in accordance with this Constitution or its duties.

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

(b) In particular, the RE is not liable for any loss or damage to any person arising out of any matter where, in respect of that matter:
   (i) it relied in good faith on the services of, or information or advice from, or purporting to be from, any person appointed by the RE;
   (ii) it acted as required by Law; or
   (iii) it relied in good faith upon any signature, marking or documents.

(c) In addition to any indemnity under any Law, the RE has a right of indemnity out of Scheme Property on a full indemnity basis, in respect of a matter unless, in respect of that matter, the RE has acted negligently, fraudulently or in breach of trust.

(d) …"

LMIM's indemnity claims and expenses properly incurred

[18] Section 72 of the TA provides that a trustee's right to indemnity is to expenses "reasonably incurred" (as opposed to "properly incurred") and s 601GA(2) of the CA provides that a responsible entity's right to indemnity must be available "only in relation to the proper performance" of the responsible entity's duties.

[19] The parties made submissions as to the scope of LMIM's right to an indemnity in accordance with these provisions and under the general law. It is appropriate to mention some, but not all, points advanced.

[20] The starting point under the unwritten law is often stated to be that a liability or expense is properly incurred if it is not improperly incurred,[5] but that formulation does nothing to explain the limits of what is proper or not improper.[6] Another statement is that properly incurred means reasonably as well as honestly incurred.[7] But again, that formulation does not explicate the relevant considerations. Not all reasonable and honest conduct, in a general sense, will meet the requirement that a liability or expense is properly incurred, because some of the duties of a trustee are strict and a liability or expense incurred by conduct in breach of such a duty will not be properly incurred.

[21] The circumstances in which a liability or expense is incurred may significantly affect whether it is properly incurred in the relevant sense. Different approaches may be seen in some categories of case, and they may give rise to differences as to what is properly incurred in that category of case.

[22] An example is a trustee's indemnity for a liability or expense comprising legal costs that the trustee is ordered to pay to a third party in unsuccessfully defending a

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5 *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547, 558.
6 Pace Ormiston JA in *Nolan v Collie* (2003) 7 VR 287, 306 [51].
7 *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547, 562.

proceeding brought against the trustee for tortious or misleading or deceptive conduct in carrying on a trading business as a trustee. Differing views over what is an expense properly incurred in that context were explored in *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)*[8] and *Nolan v Collie*,[9] but it is unnecessary to discuss them or to decide between them in this case.

[23] As to the effect of s 72 of the TA on the unwritten law, it has been said that s 72 "recognises" that a trustee who properly incurs a liability in acting as trustee is entitled to be indemnified out of the trust assets.[10] However, the significance of s 72 as statutory law should not be overlooked. The TA was an Act to consolidate and amend the law relating to trustees and trustees, inter alia.[11] If there were any difference between the operation of s 72 of the TA and the unwritten law, it would be to s 72 that the court must look as the law applying to trusts and trustees that are governed by the laws of this state.[12] In the present case, that is subject to the operation of s 601GA(2) of the CA, as a law of the Commonwealth, upon the specific subject matter of the right of indemnity of a responsible entity, if there were any inconsistency.[13]

[24] However, having regard to the equivalence of meaning of the expressions expenses "properly" incurred and "reasonably and honestly" incurred in this field of discourse, no different operation should be given to the requirement that an expense be "reasonably" incurred for a trustee to be entitled to indemnity under s 72 to that recognised in the cases decided under the unwritten law or other comparable statutory provisions, as to expenses "properly" incurred.[14]

[25] As to the effect of s 601GA(2) of the CA, neither party submitted that what would otherwise be a liability or expense properly incurred was affected by the requirement that the indemnity must be available only in relation to the proper performance of the duties of the responsible entity in relation to the facts of the present case. The parties proceeded on the footing that the rights to indemnity specified in cl 18.5 of the constitution should be construed in relation to the indemnities for expenses sought in the present case as a right to indemnity for expenses properly incurred in performance of the relevant duties of LMIM as responsible entity.

[26] As to cl 19.1 of the Constitution, in *Bruce & anor v LM Investment Management Ltd & ors (No 2),*[15] it was held that:

> "If, and insofar as cl 19.1 purports to allow the responsible entity of the FMIF an indemnity in circumstances where, short of negligence, fraud or breach of trust, it has acted improperly or not for the purpose of the trust,

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8 (2002) ATPR 41-864.
9 (2003) 7 VR 287.
10 *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439, 441.
11 *Trusts Act* 1973 (Qld), Long title.
12 *Trusts Act* 1973 (Qld), s 4.
13 *The Constitution*, s 109 and *Corporations Act* 2001 (Cth), Pt 1.1A.
14 *Kemtron Industries Pty Ltd v Commissioner of Stamp Duties (Qld)* [1984] 1 Qd R 576, 584-585. See also *A Report on the Law Relating to Trusts, Trustees, Settled Land and Charities*, QLRC 8, 1971, p 54 and *Trustees and Executors Act* 1897 (Qld), s 25(2).
15 [2013] QSC 347, [27].

> then my view is that clause of the constitution does not operate by reason of the provision at s 601GA(2)(b)."

[27] In the circumstances, I will refer to LMIM's relevant right or rights to indemnity as rights for expenses properly incurred, notwithstanding that s 72 refers to expenses reasonably incurred and the criticism of the absence of meaning of the expression "properly incurred" made in *Gatsios*.

Category 1 - legal costs of appeal 8895 of 2013

[28] The amount claimed for the legal costs of the appeal is $263,127.13. Consideration of those costs requires a short explanation of the context in which they came to be incurred.

[29] On 8 August 2013 and 21 August 2013, a Judge of this court decided that orders should be made and made orders directing that LMIM wind up the FMIF, appointing Mr Whyte as a person to take responsibility for ensuring that the FMIF was wound up in accordance with its constitution and the order and appointing Mr Whyte as the receiver of the property of the FMIF with wide powers adapted to the purpose of his appointment.

[30] On 6 September 2013, there was a separate hearing before the primary Judge on the question of costs of the applications for those and other orders.

[31] On 23 September 2013, LMIM started an appeal against the orders made by the primary Judge on 21 August 2013. The notice of appeal stated that it was against the whole of the orders made by the primary Judge.

[32] But the orders sought did not seek to set aside the order directing that LMIM wind up the FMIF. In effect, LMIM sought an order that it be given the conduct of the winding up of the FMIF by setting aside the part of the order appointing Mr Whyte. The grounds of the appeal were that the primary Judge erred in making findings in par [117] of her reasons that:

> "The administrators of the first respondent have, in my view, demonstrated a preparedness to act in a way inconsistent with those owing duties as responsible entity and trustee under the *Corporations Act.* My view is that they have preferred their own commercial interests to the interests of the fund. This is demonstrated in the conduct I have outlined above in relation to the 13 June 2013 meeting; their dealings with ASIC, and their conduct with this litigation. It extends to the point where both administrators have sworn to matters which they either conceded were wrong in cross-examination — [104] and [106] above — or in my view are not consonant with reality — [62], [88], [93] and [116] above. In a winding-up where conflicts might well arise, and may involve questions of some complexity, I feel no assurance that the current administration would act properly in the interests of members of the fund in identifying those issues or in dealing with them. In my view, that makes it necessary that someone independent have charge of winding-up FMIF pursuant to s 601NF(1) of the Act."

[33] Those findings were said to have been made in error on numerous grounds. There were six numbered grounds directed to the par [117] findings but those grounds

included over 20 separate challenges to other findings made by the primary Judge, as well as a ground that urged Mr Whyte's personal unsuitability because of an alleged conflict of duties. The notice of appeal was remarkable because of the number and extent of the alleged errors of fact raised by the grounds of appeal. But it did not allege that her Honour erred in finding that this was a winding up where conflicts might well arise as to LMIM's position.

[34] On 28 November 2013, the appeal was heard.

[35] On 10 December 2013, the primary Judge ordered that LMIM was to be indemnified from the FMIF to the extent of 20 percent of its costs incidental to the proceedings before her, excluding any reserved costs.

[36] On 6 June 2014, the Court of Appeal made orders dismissing the appeal and that LMIM pay the respondents' costs of the appeal. With some exceptions, LMIM's broadside attack on the primary Judge's findings was rejected.[16]

[37] The applicants submit that the costs of the appeal were an expense properly incurred. Mr Park said in his first affidavit that he believes that the appeal was started and prosecuted in the interests of the members of the FMIF because he believed it was a necessary and reasonable step to take, primarily because of a concern that he held about the costs of having multiple sets of insolvency practitioners appointed to wind up the FMIF. In particular, he says he was concerned that there would be duplication of effort, increased administrative expense and the potential for disputes between the insolvency practitioners about administrative matters which might result in the FMIF bearing the costs of two sets of insolvency practitioners in respect of the one issue.

[38] In a second affidavit, Mr Park said that a further reason why he believed that the appeal was started and prosecuted in the interests of the members of the FMIF was because he understood (from speaking to Ms Muller) that Mr Whyte had said that he would not make any interim distributions. Surprisingly, this reason was raised late. It was not mentioned in Mr Park's first affidavit explaining the reasons for starting and prosecuting the appeal but appeared in an affidavit produced and filed on the second day of the hearing.[17]

[39] Mr Park said that these considerations were the "paramount considerations" in deciding to institute the appeal.

[40] Although Mr Park said that he believed that the orders appointing Mr Whyte would cause unnecessary expense in the winding up of the FMIF and that Mr Whyte had said that he would not make any interim distributions, neither of those considerations was a ground of the appeal, as such.

[41] Unsurprisingly, therefore, the reasons of the Court of Appeal did not consider whether the order of the primary Judge made under s 601NF(1) of the CA appointing Mr Whyte to take responsibility for ensuring that the FMIF is wound up in accordance with its constitution and the order should be set aside because of the

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16 *LM Investment Management Ltd (in liq)(recs and mgrs apptd) v Bruce* (2014) 102 ACSR 481; [2014] QCA 136.

17 Mr Whyte challenges the extent of the statement attributed to him.

expense of Mr Whyte carrying out the terms of his appointment that would be thrown onto the fund or because Mr Whyte had said that he would not make any interim distributions (if he did say that).

[42] It is unnecessary to set out the reasons of the Court of Appeal in detail. On the hearing of the appeal, LMIM advanced the numerous grounds of appeal that the findings of fact of the primary Judge were erroneously made. Subject to individual exceptions,[18] the challenged findings were upheld as rightly made, including findings that the first applicants as administrators had engaged in misleading conduct and findings that there were possible conflicts of interest that the first applicants as liquidators of LMIM would face.

[43] The result was that the appeal was dismissed and the appellant was ordered to pay the costs of the respondents to the appeal.

[44] Mr Russell, the solicitor who had conduct of the appeal, says that after the appeal was started he obtained senior counsel's opinion that the appeal was "arguable" and that it was in the interests of the investors in the fund for the appeal to be prosecuted. The opinion was not in writing. He communicated it to Mr Park. A statement that an appeal is "arguable" is not a statement that it is more likely than not to succeed, or even that it has "reasonable" prospects of success. It is not an endorsement that substantial costs of an appeal (in this case over $250,000 of the applicants' own legal costs as well as the costs of the opposite parties), are reasonably risked, if the appeal proves to be unsuccessful.

[45] Mr Whyte raises a number of grounds in opposition to the legal costs of the appeal being a proper expense of a trustee.

[46] First, he submits that a trustee acts at its own risk, where it starts or prosecutes a legal proceeding as trustee without an order of the court that the trustee would be justified in doing so, commonly known as a "*Beddoe* order" after *re Beddoe; Downes v Cottam*.[19] That case concerned the right of a trustee to indemnity for the expense of legal costs incurred in unsuccessfully defending a proceeding brought against him as trustee as to the beneficial interests held in the trust property. The costs were the trustee's own costs and those ordered to be paid by him to the successful party in the proceeding.

[47] Lindley LJ said:

> "But a trustee who, without the sanction of the Court, commences an action or defends an action unsuccessfully, does so at his own risk as regards the costs, even if he acts on counsel's opinion; and when the trustee seeks to obtain such costs out of his trust estate, he ought not to be allowed to charge them against his *cestui que trust* unless under very exceptional circumstances. If, indeed, the Judge comes to the conclusion that he would have authorized the action or defence had he been applied to, he might, in the exercise of his discretion, allow the costs incurred by the trustee out of the estate; but I cannot imagine any other circumstances under which the

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18 The successful challenges are at (2014) 102 ACSR 481; [2014] QCA 136, [108], [111], [113], [114], [115], [116] and [121].

19 [1893] 1 Ch 547.

> costs of an unauthorized and unsuccessful action brought or defended by a trustee could be properly thrown on the estate. Now, if in this case the trustee had applied by an originating summons for leave to defend the action at the expense of the estate, I cannot suppose that any Judge would have authorized him to do so. Consequently, I should not myself have allowed these costs out of the estate."[20]

[48] This statement of relevant considerations has been applied many times. Its currency was accepted by the High Court in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand*,[21] where after setting out all but the last two sentences, the joint judgment continued:

> "That warning that trustees who become involved, or wish to become involved, in litigation should seek the court's sanction is the significant, and in later years influential, aspect of *Beddoe*…".[22]

[49] Against these propositions, the applicants rely upon *Uniform Civil Procedure Rules* (Qld), r 700. It provides that:

> "(1) This rule applies to a party who sues or is sued as trustee.
> (2) Unless the court orders otherwise, the party is entitled to have costs of the proceeding, that are not paid by someone else, paid out of the fund held by the trustee."

[50] Under r 700, the default position in relation to costs of a trustee involved in litigation is that, unless the court orders otherwise, the trustee is entitled to costs out of the fund. By r 704, those costs are to be assessed on the indemnity basis, again unless the court orders otherwise. However, to say that r 700 operates on that default position does not inform as to the principles or considerations relevant to the exercise of the discretion to order otherwise. Does r 700 affect the orders that would be made in accordance with the previously identified statutory provisions and principles?

[51] First, r 700 is a rule of court which has the status of delegated legislation subject to the operation of the *Supreme Court Act* 1991 (Qld), under which it was made. Therefore, it does not affect the operation of s 72 of the TA. Nor could it affect the operation of s 601GA(2) of the CA in relation to a responsible entity's entitlement to an indemnity.

[52] Second, as a matter of context relevant to its proper construction, r 700 was introduced by the *Uniform Civil Procedure Rules* 1999 (Qld) and thereby replaced O 91 r 1 of the repealed *Rules of the Supreme Court* 1900 (Qld). Order 91 r 1 had provided, in part:

> "(1) Subject to the provisions of the Judicature Act 1876 and these rules, the costs of and incidental to all proceedings in the Court, including

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20 [1893] 1 Ch 547, 557.
21 (2008) 237 CLR 66.
22 (2008) 237 CLR 66, 87 [48].

> the administration of estates and trusts, shall be in the discretion of the Court or Judge.
>
> (2) However, nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings of any right to costs out of a particular estate or fund to which he would be entitled according to the Rules heretofore acted upon in courts of equity…".

[53] When O 91 r 1 was repealed and the UCPR were introduced, r 681 (as it is now numbered)[23] provided that costs of a proceeding are in the discretion of the court but follow the event, unless the court considers another order is more appropriate, but the proviso to O 91 r 1(2) was not re-enacted. Instead, r 700 (as it is now numbered)[24] was introduced.

[54] The model for the text of r 700 may be traced back to amendments made to the corresponding *Rules of the Supreme Court* in England and Wales. Prior to 1 January 1960, O 65 r 1 of those rules was in much the same form as O 91 r 1 of the corresponding Queensland rules. From that date, O 65 r 1 was repealed and *The Supreme Court Costs Rules* 1959 provided by r 3(2) that subject to those rules costs were to follow the event. Rule 6(2) provided that, unless the court otherwise orders, where a person is a party to a proceeding in the capacity of trustee he shall be entitled to the costs of those proceedings not recovered from or paid by any other person out of the trust fund, and made further provision limiting the grounds on which the court might otherwise order, that do not appear in r 700.

[55] There are also comparator rules of court to r 700 in other Australian jurisdictions.[25]

[56] In my view, r 700 operates in relation to legal costs of a proceeding so that a trustee is entitled to those costs from the fund held on trust unless the court otherwise orders. However, the considerations by which the court might otherwise order include those in *Beddoe* and discussed below. The trustee's legal costs of the proceeding, meaning or including the trustee's own costs are still a liability or expense incurred by the trustee, payable to the trustee's lawyer. Rule 700 does not affect the provision in s 72 of the TA that the trustee's entitlement to an indemnity is limited to expenses reasonably incurred, meaning properly incurred. If legal costs are not properly incurred, the court will make an order otherwise than that the trustee is entitled to have the costs of the proceeding paid out of the fund.

[57] I note that the applicants did not argue that the effect of r 700 and the order of the Court of Appeal that LMIM pay the other parties' costs of the appeal was that the applicants were entitled to an indemnity for their costs of the appeal from the property of the FMIF as the Court of Appeal had not otherwise ordered.

[58] In my view, it is important to recognise that Lindley LJ's statement in *Beddoe* is not a distinct species of the trustee's right to indemnity for expenses properly incurred. Rather, it articulates what considerations will or may be expected to establish that

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23 It was then numbered r 689.

24 It was then numbered r 701.

25 *Supreme Court (General Civil Procedure) Rules* 2015 (Vic), r 63.26; *Uniform Civil Procedure Rules* 2005 (NSW), r 42.25; *Supreme Court Rules* 1987 (SA), r 101.01(2); and *Rules of the Supreme Court* 1971 (WA), O 66 r 9(2).

the legal costs incurred by a trustee in prosecuting or defending a particular proceeding are expenses properly incurred. The underlying informing principle is that a trustee is expected not to engage lightly in litigation that will or may incur costs that will diminish the trust property. The trustee is only to do so if the circumstances justify it. Lindley LJ's statement of the relevant considerations informs what may be a liability or expense properly incurred in those circumstances.

[59] In my view, this approach is consistent with *Adsett v Berlouis*, where the Full Court of the Federal Court said:

> "The critical question, in our view, is whether or not the conduct which gave rise to the burden of costs – whether costs ordered to be paid or costs incurred by the trustee in prosecution of the litigation – was proper in the sense explained in *Beddoe*; that is, whether the expenditure was reasonably, as well as honestly, incurred."[26]

[60] Mr Russell says that there was not enough time to bring a *Beddoe* application for the proposed appeal. I reject that contention. The order appointing Mr Whyte was made on 21 August 2013. The appeal was heard on 28 November 2013. Although it may have required prompt action, there was time to bring an application for a *Beddoe* order. I observe that it would have been the obligation of the applicants if they brought such an application to have brought the prospects, the amount of the likely expenditure of and exposure to costs of other parties and the relevant case law to the attention of the Judge hearing a *Beddoe* application.

[61] There is another line of relevant cases that deal with a trustee's costs of starting and prosecuting an unsuccessful appeal, as opposed to the trustee's costs of a proceeding at first instance. In *re the Earl of Radnor's Will Trusts*[27] a trustee under a will unsuccessfully opposed an application by a life tenant for the court's authorisation under a statutory power for the sale of heirlooms settled upon successive life interests under the trust. The trustee unsuccessfully appealed from the court's discretionary decision to authorise the sale. The question arose whether the trustee ought to be indemnified for the costs of the appeal from the fund. Lord Esher MR said:

> "One of the appellants was the surviving trustee of the will; he and the other appellant were perfectly entitled to take the opinion of Mr. Justice Chitty as to what was right to be done; but when they appeal to this Court from him, being absolutely protected as trustees by his decision — I do not say they are wrong in appealing, but they appeal to this Court under the ordinary conditions of Appellants, and they fail in the appeal; therefore this appeal must be dismissed with costs."

[62] *Miller v Cameron*[28] is another illustration. A trustee unsuccessfully appealed from an order removing the trustee from office and was ordered to pay the costs of the appeal, without an order for indemnity.

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26 (1992) 37 FCR 201, 211 – 212.
27 (1890) 45 Ch D 402, 423.
28 (1936) 54 CLR 572.

[63] In *Australian Incentive Plan Pty Ltd v Attorney-General for Victoria (No 2)*,[29] a trustee applied for an order to vary an employees' incentive scheme trust consequent upon the winding up of the employer. The trustee then unsuccessfully appealed. Nettle JA said:

> "The appellant trustee, having failed in its appeal from the orders of Croft J, seeks an order that the costs of all parties be paid out of the trust fund.
>
> The general rule is that a trustee is justified in taking the opinion of the court at first instance and that the trustee's costs of an application for advice will be paid out of the trust fund as between solicitor and client. Similarly, if there is a successful appeal against the judicial construction of a will or trust, a trustee who is joined as a respondent to the appeal is ordinarily entitled to have its costs and expenses of the appeal paid out of the fund as between solicitor and client.
>
> Contrastingly, however, as Lord Esher MR said in *Re Earl of Radnor's Will Trusts*, if a trustee, after taking the advice of the court at first instance, appeals against the court's determination, the trustee is ordinarily regarded as being in much the same position as any other appellant and so, if unsuccessful in the appeal, will be ordered to pay costs personally.
>
> In *Rosenthal v Rosenthal*, Higgins J referred to the latter rule as one of long standing that, although trustees are entitled to their costs out of the estate of getting the guidance of the court in cases of difficulty, they appeal at their own risk and ordinarily must take the usual consequences. More recently, the rule was applied by the Full Court of Western Australia in *Re Bubnich* and was considered by this court in *Forsyth v Sinclair (No 2)* . Plainly, the purpose of the rule is that, but for its existence, estates would very frequently be frittered away in costs."[30] (footnotes omitted)

[64] The subject of a trustee's costs of legal proceedings has attracted much judicial and academic writing. In some of the academic treatises, the subject is divided into different categories of case. Litigation over the construction, administration or execution of an express trust,[31] litigation against the trustee for breach of trust, litigation between the trustee and a third party,[32] litigation against the beneficiaries,[33] and litigation between the beneficiaries to which the trustee is a party[34] may be thought to represent different categories or sub-categories.

[65] In *Alsop Wilkinson v Neary*,[35] Brightman J attempted to classify the relevant types of proceedings in which a trustee should or should not make a *Beddoe* application for protection of the trustee's costs. However, helpful as it is, Brightman J's classification has not been wholly adopted by a court of binding authority.[36] And

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29 (2012) 44 VR 661.
30 (2012) 44 VR 661, 663 – 664 [2] – [5].
31 Tucker, Poidevan and Brightwell, *Lewin on Trusts*, 19 ed, [27-108] – [27-109].
32 Tucker, Poidevan and Brightwell, *Lewin on Trusts*, 19 ed, [27-110].
33 Ford, Lee, Bryan and Glover, *Ford and Lee's Law of Trusts*, 2012, [14.3420].
34 Ford, Lee, Bryan and Glover, *Ford and Lee's Law of Trusts*, 2012, [14.3430].
35 [1996] 1 WLR 1220.
36 For example, see *Sons of Gwalia Ltd v Margaretic* (2006) 232 ALR 119, 121 – 122 [5] – [10].

even in the case of a trustee's appeal, there is no bright line test as to whether a trustee must make a *Beddoe* application to be able to obtain an order that the trustee's costs should be paid from the estate.[37]

[66] It is not to be thought that any of these statements amounts to an absolute rule. They are statements of considerations that are relevant in answering the question whether the costs of the appeal in the present case were properly incurred by the applicants as expenses of the FMIF. There are other cases,[38] but I have not been referred to or found one where an appellant trustee was indemnified from the trust property for the costs of an unsuccessful appeal.[39] An informing principle is that where a dispute as to the proper administration of a trust has been decided finally by the court below, the trustee is not at risk of personal liability in acting in accordance with that decision. It is not incumbent upon a trustee to appeal the court's decision. The applicants were not required to appeal the primary Judge's orders so as to seek the removal of Mr Whyte in order to protect their own position vis a vis the members of the FMIF.

[67] Mr Whyte relies on *Beddoe* as supporting three particular considerations relevant to the indemnity claimed by the applicants for their legal costs of the appeal. First, where a trustee starts and prosecutes a proceeding unsuccessfully, without obtaining an order from the court advising that he or she is justified in doing so, it is only in an "extraordinary" case that the costs of the unsuccessful proceeding will be treated as an expense properly incurred. Second, in assessing whether it is an extraordinary case, the court will consider whether the trustee would have obtained a *Beddoe* order if an application had been made at the proper time. Third, these propositions apply even if the proceeding was started and prosecuted with the benefit of advice that the proceeding had "reasonable" prospects of success.

[68] Mr Whyte submits this is not an extraordinary case where an indemnity should be allowed. He submits that if a *Beddoe* order had been applied for the prospects of success would not have warranted the grant of the order. He submits that:

(a) the institution of an appeal starts a further proceeding;
(b) the primary Judge had already heard and emphatically rejected (at least most of) the contentions which LMIM wished to advance; and
(c) the appeal was to be based upon whether some of the inferences drawn by the primary Judge from the primary facts were open on the evidence and in the light of the way the cross-examination had been conducted.

[69] Mr Whyte further submits that the appeal was from a discretionary order that was supported by a number of uncontentious facts, found by the primary Judge, as follows:

(a) the FMIF should be wound up;

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37 *Re Londonderry's Settlement* [1965] Ch 918; Tucker, Poidevan and Brightwell, *Lewin on Trusts*, 19 ed, [27-153].

38 *Perpetual Executors and Trustees Association of Australia v Wright* (1917) 23 CLR 185, 194, 198; *Rosenthal v Rosenthal* (1910) 11 CLR 87, 99.

39 See, however, *Stuart, Re; Johnson v Williams* [1940] 4 All ER 80.

(b) the winding up of the FMIF would involve considerable complexity and time;
(c) there was the real potential for various conflicts of interest to arise between the applicants and the FMIF;
(d) one possible way for the Court to deal with the conflicts was to appoint an independent receiver to take responsibility to ensure the winding up of the scheme;
(e) if an independent receiver were appointed, any wasted costs from prior work by the liquidators was likely to be small in the overall cost of the winding up;
(f) in making a discretionary determination of what order should be made, it was relevant to consider whether the liquidators had demonstrated a capacity and preparedness to deal with these difficult issues in accordance with their duties; and
(g) the liquidators (then as administrators) had undertaken a series of acts (including misleading conduct), in relation to the convening of a meeting of members of the FMIF and in dealing with ASIC, which were potentially relevant to this issue.

[70] Finally, Mr Whyte submits that the appeal was not started and prosecuted solely in the interests of the investors as beneficiaries of the FMIF but also had as its object to protect the personal interests or reputation of the first applicants.

[71] Mr Park says (and I accept) that he was aware of criticisms made by the primary Judge of the conduct of Ms Muller and him and that the matter had attracted some publicity. He was not happy to have been the subject of the findings that her Honour made or with the attendant publicity. However, that was in his view only incidental to the question of whether the appeal should proceed.

[72] The applicants submit that there can be no doubt that the appeal concerned a benefit to the estate, for the reasons given by Mr Park. The applicants submit further that it is not to the point that the appeal was unsuccessful. I disagree. Had the appeal been successful, the question whether the liability or expense of the legal costs of the appeal was properly incurred would not have arisen, most likely. On the other hand, it may be accepted that the fact that the appeal was unsuccessful does not foreclose the answer to the question whether the legal costs were properly incurred. Nevertheless, it is the occasion for examination of the *Beddoe* and *Radnor* considerations as informing whether the legal costs were expenses properly incurred.

[73] The applicants submit that Mr Whyte took the view that the appeal costs were liable to be indemnified out of the assets of the FMIF because he accepted the indemnity claim for Mr Shotton's costs, who had the benefit of costs order against LMIM.

[74] Again, I disagree. First, Mr Shotton was a successful applicant before the primary Judge for an order that the FMIF be wound up under s 601NF(1) of the CA and Mr Whyte be appointed as a person to take responsibility for ensuring that the FMIF is wound up under s 601NF(2) of the CA. LMIM, which opposed those orders, was ordered to pay his costs. Mr Whyte agreed in effect to indemnify LMIM for that liability from the property of the FMIF by paying Mr Shotton's costs before the primary Judge from that property. That said nothing at all about any costs of the appeal.

[75] Second, because LMIM's appeal was dismissed and LMIM was ordered to pay Mr Shotton's costs of the appeal, Mr Shotton was a successful party in the appeal. He incurred costs because the responsible entity of the FMIF by its liquidators brought the appeal against him. Mr Whyte agreed in effect to indemnify LMIM for that liability from the property of the FMIF by paying Mr Shotton's costs of the appeal. Mr Shotton was not a trustee seeking indemnity in respect of those costs. LMIM was. Mr Shotton did not start the appeal. LMIM did and made him a respondent. Mr Shotton sought to uphold what were, in his view, the interests of the members of the FMIF by maintaining the appointment of Mr Whyte, and did so successfully. Whether or not others agree with that view is not to the point. His position is not comparable to that of the applicants and the question whether the applicants should have been indemnified for Mr Shotton's costs is not comparable to the applicants' claim for their own legal costs as expenses properly incurred.

[76] Finally, in any event, on this hearing Mr Whyte's view is not determinative.

[77] The applicants submit that there is no evidence that the appeal was brought to protect the personal interests or reputation of the first applicants because of the findings against them personally and that inference is not supportable in circumstances where Mr Park deposed to his belief as to the propriety of the expenses and was not cross-examined to suggest the contrary. I accept that Mr Park's evidence should not be rejected, namely that he believed that an appeal was a necessary and reasonable step for Ms Muller and him to have caused LMIM to take in seeking to protect the interests of the FMIF primarily because of a concern that he held about the costs of having two sets of insolvency practitioners appointed to wind up the FMIF.

[78] However, the question for determination does not turn on Mr Park's subjective belief.

[79] As well, it cannot be ignored that this concern was neither a ground of appeal nor a matter that figured in the appeal sufficiently to be mentioned in the reasons of the Court of Appeal. The applicants submit that does not preclude a finding that the appeal was reasonably brought, but in my view the primary consideration in assessing whether the costs of the appeal were properly incurred is whether bringing the appeal was likely to benefit the members of the FMIF. A substantial criticism is that the appeal had only "arguable" prospects of success at significant cost to the FMIF, if unsuccessful. It is not a sufficient answer to say that if the appeal had been successful Mr Park believed that duplicative future costs would have been avoided and an interim dividend could be made.

[80] Nor can it be ignored that the thrust of the appeal consisted of many challenges made by the applicants to findings of the primary Judge that were made adversely to the first applicants' conduct of the administration, on the footing that those findings were of a serious kind that should not have been made. By and large, they were findings in which the applicants had an interest, but they were not findings in which the members of the FMIF had a direct interest. The objective conclusion is that the applicants had a personal interest in the subject matter of the appeal that was as strong as, any direct interest the members of the FMIF might have had in overturning the challenged findings.

[81] The applicants further submit that, in any event, authority does not support that the costs of the appeal were not properly incurred merely because the appeal concerned the first applicants' personal interest in the findings made against them by the primary Judge, relying upon *Walters v Woodbridge*,[40] *Kirwan v Cresvale Far East Ltd*,[41] *re Biposo Pty Ltd; Condon v Rogers (No 3)*[42] and *Wales v Wales (No 3)*.[43]

[82] However, those cases are not comparable. *Walters* is authority for the proposition that a trustee who successfully defends a proceeding alleging misconduct or breach of trust will usually be indemnified for the liability or expense of their legal costs from the trust property notwithstanding that the trustee was defending allegations made against him or her personally.. *Biposo* was a case where a liquidator was removed on the ground of public interest in circumstances where there were complaints as to the liquidator's conduct but he was nevertheless granted an indemnity for his costs of the proceeding out of the assets of the company. However, as explained in *Kirwan*, it is of little general relevance. *Wales* was a case where it was held that a trustee was entitled to an indemnity for the costs of successfully bringing an application notwithstanding that the orders made excused it from a breach of duty because the proceeding was a necessary step in seeking to wind up the trust where the trustees had no option but to seek the advice of and directions from the court.

[83] In the present case, the subject matters of the grounds of the appeal and the matters dealt with in the reasons of the Court of Appeal amply show that the proposed appeal was centrally concerned with whether the primary Judge rightly made many findings adverse to the first applicants. Even if more of those findings had been overturned, it would not have followed necessarily that the order appointing Mr Whyte would have been set aside. The scope for conflicts in LMIM's position in the winding up of the FMIF and other funds ordered to be wound up did not depend upon those findings.

[84] The finding of the primary Judge of a possibility of a conflict or conflicts of duty and interest or duty and duty in making the order to appoint Mr Whyte was not challenged by the grounds of appeal or upon the hearing of the appeal. And it was not argued that the appointment of an independent person under s 601NF(1) was not a method of dealing with the possibility or likelihood of such conflicts. These points are not gainsaid by Mr Shotton's unsuccessful notice of contention that further findings as to the extent of the conflicts were warranted.[44]

[85] Mr Park said in his affidavit in support of the present application that he was well experienced in dealing with questions of conflicts that may arise in the winding up of a company that is a trustee. Yet, it was not said or argued that the conflicts that had emerged at the time of this affidavit were of the kind that would have been appropriately dealt with by the applicants without separate representation for the members of the FMIF. In any event, in my view, the very real scope of the

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40 (1878) 7 Ch.D. 505.
41 (2002) 44 ACSR 21, 107 – 109 [417] – [430].
42 (1995) 17 ACSR 730.
43 [2015] VSC 151, [68] – [74].
44 *LM Investment Management Ltd (in liq)(recs and mgrs apptd) v Bruce* (2014) 102 ACSR 481; [2014] QCA 136, [136] – [161].

possibility for significant conflicts was apparent at the time of starting the appeal, as appears from the discussion in the reasons of the Court of Appeal.[45]

[86] In my view, in this case, having regard to the *Beddoe* and *Radnor* considerations, there was nothing in the circumstances of the appeal as proved by the evidence before me, that justified bringing an arguable appeal at the likely expense of the trust property, if the appeal were unsuccessful, as an expense properly incurred. On the contrary, I find that Mr Whyte has "shown", if the onus lies on him,[46] that the costs of the appeal were improperly incurred.

[87] It follows that the amount of $263,127.13 for those costs should not be paid to the applicants from the property of the FMIF. It also follows that the costs of the assessment of those costs in the amount of $9,068.68 included in the Category 5 total should not be paid to the applicants from the property of the FMIF.

Category 2 – liability insurance premiums

The amount of this claim is $61,391.78. It is calculated as 76.62 per cent of the invoices for premiums for two policies of liability insurance.[47] The basis of the apportionment was not clear but is intended to allocate to the FMIF its share of the invoices that were paid in respect of the business of all the funds. The invoices were:

Invoice Date	Invoice Number	Amount
02.11.15	289543	$55,050.00
02.11.15	289547	$25,075.00
Total		**$80,125.00**

[88] The policies of insurance were taken out by the liquidators and LMIM. The two policies relate to primary and excess layers for substantially the same cover.

[89] Mr Whyte opposes these expenses as not properly incurred because of the absence of a need for the cover obtained. In particular, he says that the first applicants as liquidators ought to have had their own professional indemnity cover.[48] Further, he submits the expense of that sort of insurance is an item of overhead, and not to be charged against a particular administration.

[90] Tax invoice 289543 provided in the schedule that the class of policy was "Risk Cover PI Trade On Ver 5" and that the policy wording was "based on Arthur J Gallagher – Insolvency and Turnaround – Trade On PI v11052015, agreed with

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45 *LM Investment Management Ltd (in liq)(recs and mgrs apptd) v Bruce* (2014) 102 ACSR 481; [2014] QCA 136. [136] – [161].

46 Quaere, *Nolan v Collie* (2003) 7 VR 287, 308 [55].

47 The basis of the apportionment of 76.62 per cent is the same as the basis of the applicants' allocation of Category 2 expenses in the Remuneration application. The parties accept that the percentage allocation should be made having regard to the determination of the appropriate basis of allocation in that case.

48 *Corporations Act* 2001 (Cth), s 1284.

underwriters". The period of insurance was from 13 November 2015 to 13 November 2016. The risk insured was:

> "To indemnify the Insured against any civil liability incurred in connection with the Professional business arising from any Claim that is first made during the period of insurance in respect of the Insured's conduct of the Professional business."

[91] The insured were LMIM, LMA and the first applicants. The professional business was defined as "Manager & Loan Administrator of various Funds. Management and Loan Administration of various Funds".

[92] Clause 1 of the policy wording for Insolvency and Turnaround – Trade On PI v11052015 provided that:

> "The Insurer will indemnify the Insured against civil liability for compensation and claimant's costs and expenses in respect of any Claim first made against the Insured during the Policy Period that shall not exceed the Limit of Indemnity."

[93] On 2 April 2015, ASIC suspended LMIM's Australian Financial Services Licence No 220281 for a period of 2 years. However, by Schedule A of the notice of suspension it was provided that for the provision of financial services which are reasonably necessary for or incidental to, inter alia, preserving the assets and affairs of, or the winding up of the FMIF, the licence continued in effect as though the suspension had not happened.

[94] Clause 22 of the licence required that LMIM must maintain an insurance policy covering professional indemnity that was adequate having regard to the nature of the activities carried out by LMIM under the licence and other requirements.

[95] It is unnecessary to set out further details. The policy indemnified LMIM against civil liability incurred in connection with management and loan administration of the FMIF. It did the same for LMA. These indemnities operated in addition to any policies of insurance that indemnified the first applicants as liquidators. On one view, they were required by cl 22 of the licence.

[96] In my view, the expenses incurred for the policy premiums were properly incurred. The amount to be allowed should be the appropriate apportionment as between the FMIF and the other funds.

Category 3 – legal costs related to production of books

[97] The amount of the legal costs of this item are $25,480.42. They were entirely or mostly for fees payable to the applicants' solicitors in respect of advice in connection with the production of the books and records of LMIM. The books and records relating to the affairs of the various funds are intermingled, so that there have been difficulties in making the appropriate range of documents available to the trustees or beneficiaries of particular funds, or ASIC, or the former directors of LMIM, where they have been sought. There were five relevant invoices:

Invoice Date	Invoice Number	Indemnity claimed

28.07.14	B18603	$92.69
31.07.15	B22433	$9,967.32
31.08.15	B22832	$3,525.82
30.09.15	B23055	$1,390.62
30.10.15	B23460	$4,646.14
30.11.15	B23746	$5,857.84
Total		**$25,480.43**

[98] Mr Park said that the costs relate to applications to produce the books and records of LMIM and, in particular, to the applicants' dealing with ASIC and Mr Whyte over the discovery and production by ASIC of documents it had previously obtained from LMIM in proceedings brought by ASIC in the Federal Court against the former directors of LMIM. He formed the view that protecting legal professional privilege in the documents of LMIM was necessarily a task that affected all the funds, including the FMIF.

[99] Accordingly, he believed that the costs were reasonably and necessarily incurred and that an appropriate proportion should be allocated to the FMIF.

[100] Mr Whyte opposes the expenses as not properly incurred because his own view was that the interests of the investors did not require that any claim of legal professional privilege be considered. In particular, he submits that the disclosure of documents to the other parties in the ASIC proceedings did not raise a sufficient risk to warrant the expense.

[101] The parties did not explore the extent of any relevant risk in submissions. It would not be appropriate to do so in detail in these reasons either. But a few obvious legal considerations may be mentioned.

[102] First, although ASIC may use or permit the use of any books produced under s 33 of the *Australian Securities and Investments Act* 2001 (Cth),[49] it is arguable that legal professional privilege was not abrogated by a notice given to LMIM by ASIC under s 33.[50] Second, LMIM's legal professional privilege against production of the documents to any other persons will not have been waived over documents produced by LMIM to ASIC under compulsory process.[51] Third, voluntary production of a document in a legal or administrative proceeding may constitute a waiver of legal professional privilege as against all persons.[52] Fourth, ASIC's request that LMIM identify any documents over which legal professional privilege was claimed among those to be discovered in the Federal Court proceedings suggested that discovery might affect any legal professional privilege that would

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49 *Australian Securities and Investment Commission Act* 2001 (Cth), s 37(4).
50 Austin and Ramsay, *Ford's Principles of Company Law,* [3.201.6].
51 *Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141, 156, 161.
52 *Goldberg v Ng* (1995) 185 CLR 83.

otherwise exist. Fifth, discovery was to be made to the former directors of LMIM subject to the implied undertaking limiting the use of discovered documents to the purpose for which it is given.[53]

[103] It is not necessary to analyse further the extent of the risk of loss of legal professional privilege or whether it was in the interests of the members of the FMIF that the privilege be maintained by notifying ASIC that LMIM opposed disclosure by ASIC of any of the documents. I would add that, in my view, it was appropriate for the parties not to devote further legal costs to these questions in this proceeding. To do so would be to increase the costs attached to whether an amount that is not a large amount in the scale of things was an expense properly incurred.

[104] In my view, the better conclusion is that the amount claimed was an expense properly incurred, because it was not clear that not identifying documents over which legal professional privilege could be claimed did not present any risk to the interests of the members of the FMIF. It was a matter of professional judgment on which reasonable minds may differ.

[105] Accordingly, in my view it is an expense properly incurred to be paid from the property of the FMIF in accordance with an appropriate proportionate allocation.

Category 4 – costs of the assessment of the applicants' legal costs, including resisting Mr Whyte's application to be heard on the costs assessments of the applicants' solicitors costs

[106] The total amount claimed by the applicants under this item is $20,776.37. The relevant invoices are:

Invoice Date	**Invoice Number**	**Indemnity claimed**
22.12.14	B20191	$2,200.00
31.08.15	B22835	$7,826.96
30.09.15	B23062	$3,506.23
31.10.15	B23465	$10,000.83
30.11.15	B23749	$16,174.44
21.12.15	B23944	$1,067.91
Less	Payment	-$18,000.00
Total		**$22,776.37**

[107] The amount claimed was reduced from $22,776.37 to $20,776.37 by the applicants' written submissions.

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53 *Hearne v Street* (2008) 235 CLR 125, 154 – 155 [96].

[108] I deal first with the applicants' legal costs of opposing Mr Whyte's application to be heard on the costs assessments of the legal costs payable by the applicants to their solicitors. On the hearing of the present application, Mr Whyte urged that he had only sought "guidance" from the court as to whether he should be involved. The submission was that Mr Whyte was simply seeking directions as if by an application for judicial advice by a trustee. That was not how the application was conducted. Although nominally for "directions" as to numerous matters, the orders sought were based on Mr Whyte's contentions that he was either entitled to be heard or as a matter of discretion it should be ordered that he be heard on the assessments of the applicants' solicitors' costs as between the applicants and their solicitors and that he would not be bound by the assessments, if he was not heard. He made the applicants respondents to the application.

[109] I refused Mr Whyte's application because I did not accept that it was in the interests of the members of the FMIF for him to be involved in the assessment of those costs. It could be carried out adequately by the costs assessor exercising his professional skill and duties under the *Legal Profession Act* 2007 (Qld) in the absence of an adversarial opponent. It was not suggested by the applicants that the assessment would bind Mr Whyte, but was submitted that the amounts assessed would evidence the amounts that were fair and reasonable.

[110] I ordered that Mr Whyte pay the applicants' costs of that unsuccessful application for "directions" to be assessed on the standard basis. Those costs were agreed in the amount of $18,000. As the evidence of the breakdown of this item showed, the applicants' solicitors' professional costs of the application were $18,656.44 and counsel's fees were $10,642.50. After allowing for the amount of $18,000 agreed as the amount of costs on the standard basis, under the order for costs I made in their favour, the applicants remain out of pocket for $11,298.94 for their costs of that application. I will call that the "additional amount".

[111] However, at the same time as I ordered that Mr Whyte pay their costs on the standard basis, I refused the applicants' application for an order that he pay those costs to be assessed on the indemnity basis. By this application the applicants seek to outflank the effect of the order I made refusing their costs on an indemnity basis, and to recover the additional amount upon an indemnity from the FMIF as expenses properly incurred.

[112] In my view, the additional amount was not an expense properly incurred because the amount was not reasonable. The hearing of the application was brief. It took only minutes to resolve based on the absence of a reasonable ground for Mr Whyte to become involved as an extra party to the assessment of costs as between the applicants' solicitors and the applicants.

[113] In my view, the additional amount was not an amount of expense properly incurred.

[114] The balance of the applicants' legal costs for the assessment process constitute the costs of preparing the costs statements or equivalent information for the costs assessor, the costs of the consent order for the costs assessment and other items in reaching the assessments. By subtraction of the additional amount of $11,298.94 from $22,776.37, they may total $11,477.43. That amount, if correct, should be recoverable as expenses properly incurred if it was reasonable for the applicants to obtain the costs assessments. In the absence of any other contention or evidence

that the amount was not reasonable, it should be allowed as an expense properly incurred.

Category 5 – the assessor's costs of assessment of the legal costs

[115] I have already determined that the amount of $9,068.68 for the costs of the assessment of the costs of the appeal was not an expense properly incurred because the costs of the appeal were not an expense properly incurred.

[116] The balance of the total amount claimed under this item is $6,279.86, over five separate costs assessor's certificates. Where appropriate, the amounts have been apportioned.

[117] The applicants submit that it was reasonable for them to obtain costs assessments of their legal costs for the purpose of showing that the amounts of the costs were reasonable and, therefore, that those amounts were expenses properly incurred.[54]

[118] Mr Whyte opposes the assessor's costs as expenses properly incurred on the ground that it was not reasonable for the expense to be incurred and that the assessments are of no value because there was no contradictor. I reject both contentions and express some disappointment that an amount of this size should have to be resolved by ventilating the issue in this court.

[119] Mr Whyte submits that there is no evidence of any practice that a trustee's costs should be assessed in the absence of a dispute as to their amount. I note that it was once the case that statute precluded a trustee from recouping or exonerating legal costs unless they had been taxed.[55] Although that rule did not apply in all cases outside the litigious context,[56] it would have applied in this context. That rule was repealed from 1999, on the introduction of the *Uniform Civil Procedure Rules*. In the absence of the former statutory requirement, whether the amount of legal costs a trustee seeks to recoup or exonerate by way of the trustee's right to indemnity for legal costs incurred in and about litigation is an expense properly incurred still depends, inter alia, on whether the amount is reasonable.

[120] The recoverability of the costs payable by the applicants as clients to their solicitors as a law practice is subject to the *Legal Profession Act* 2007 (Qld).[57] A "bill" is usually required.[58] The bill must contain or be accompanied by a written statement as to the client's entitlement to a costs assessment under Ch 3 Pt 4 Div 7 of the Act. The client or a third party payer has a right to apply for assessment,[59] as does the law practice.[60] An appointed assessor must assess the costs on the bill by reference

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54 I note that the applicant for the costs assessment was the law practice not the applicants, but there was no suggestion made other than that the purpose was to establish that the amounts of the costs were prima facie fair and reasonable as between the applicants and the law practice for the applicants' benefit as against the property of the FMIF.

55 *Rules of the Supreme Court* 1900 (Qld), O 91 r 36. *Re JF Fitzgerald and Seymour's Bill of Costs* [1960] Qd R 430.

56 *Re J F Fitzgerald & Seymour's Bill of Costs* [1960] Qd R 430.

57 *Legal Profession Act* 2007 (Qld), s 319.

58 *Legal Profession Act* 2007 (Qld), s 329.

59 *Legal Profession Act* 2007 (Qld), s 335.

60 *Legal Profession Act* 2007 (Qld), s 337.

to the statutory criteria for assessment.[61] If the costs on the bill are reduced by more than 15 per cent the law practice must pay the costs of the assessment, otherwise the party ordered by the assessor must pay the costs.[62]

[121] The assessment of costs, like the system of taxation of costs that preceded it, operates in a trade area where lawyers have a statutory monopoly for the provision of legal services. Ready access to a system of review of costs provides a remedy to control excessive charging. Whether or not a law practice and client enjoy good relations, there is an advantage in a system of review by assessment of whether costs are billed in a fair and reasonable amount and in accordance with a costs agreement, where there is one. The advantage extends to all law practices and clients.

[122] In my view, Mr Whyte's claim that an assessment of the costs payable by the applicants to their solicitors is of no value because there was no contradictor may be an example of the entrenched oppositional stances into which the applicants and their lawyers on the one hand and Mr Whyte and his lawyers on the other hand sometimes retreat. On both sides, there have been times when those positions are justified. But I rejected Mr Whyte's view that it was necessary for him to incur another set of legal costs (at the prima facie expense of the members of the FMIF) for his solicitors to oppose the amounts of the applicants' lawyers' charges for their legal costs against the applicants, else the independent assessor's assessment of those costs would be valueless.

[123] In my view, where Mr Whyte had not accepted that the amounts of the relevant legal costs were reasonable, it was prudent and appropriate for the applicants to establish[63] their prima facie reasonableness as to amount, and the costs incurred by the applicants in doing so were properly incurred.

LMIM's indemnity claims and the clear accounts rule

[124] Mr Whyte submits that an overarching reason why no order should be made in favour of LMIM's indemnity claims is because of the operation of the principle described as the "clear accounts rule".

[125] Under that principle, Mr Whyte submits that LMIM's right to indemnity for expenses under cl 18 of the constitution or otherwise, if any, is subject to a reduction to account for a counter-liability for the amount of loss suffered by reason of breaches of trust or duty as responsible entity.

[126] I repeat two paragraphs from my reasons in the Remuneration application:

> "In *RWG Management Ltd v Commissioner for Corporate Affairs*,[64] Brooking J identified a series of important and inter-related principles. First, a trustee has a right to an indemnity for expenses, limited to the

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61 *Legal Profession Act* 2007 (Qld), s 341.

62 *Legal Profession Act* 2007 (Qld), s 342.

63 I note that the solicitors were the applicants for the orders for assessment, but this did not alter the applicants' purpose in establishing the prima facie reasonableness of the amounts of the costs incurred.

64 [1985] VR 385.

> expenses properly incurred. Second, where a trustee's conduct in relation to incurring an expense is in breach of duty any liability thereby incurred is usually not properly incurred. Third, however, a trustee may have a right to an indemnity for an expense not properly incurred that benefits the trust estate. Fourth, there is no absolute rule that a trustee in breach of duty may not recover an indemnity for unrelated expenses properly incurred. Fifth, where a trustee's entitlement to an indemnity for a liability properly incurred is subject to a counter-liability for his breach of trust a balance is to be ascertained on the cross-liabilities and the trustee is entitled to payment of any balance in his or her favour.
>
> The balance to be ascertained, as described by Brooking J, was interpreted by Gordon J in *Australian Securities and Investment Commission (ASIC) v Letten (No 17)*[65] to require that the trustee in breach makes good any loss caused to the estate as a condition precedent to payment upon the right of indemnity, which her Honour described as the "clear accounts rule". However, the balance Brooking J referred to is arrived at by the reduction of the amount of the right to indemnity by the amount of the relevant counter-liabilities. If the balance favours the trustee, there is no requirement that the trustee make good the loss other than by allowing the reduction. An important point made by Gordon J is that a trustee's right to indemnity may be reduced by the amount of a counter-liability for breaches unrelated to the expenses for which the right of indemnity is claimed.[66]"

[127] On 17 February 2016, Mr Whyte (by his solicitors) wrote to the applicants about a number of potential claims against LMIM. One was said to be for the amounts of loan recovery fees and costs paid by LMIM to LMA. The amounts stated all related to periods prior to the first applicants' appointment as administrators, except for the sum of $928,483.39 for the period after 1 March 2013. Another was said to be for the pre-payment by LMIM of management fees to LMA, but no amount was identified as relating to the period after the appointment of the first applicants as administrators.

[128] On the hearing of this application, Mr Whyte relied on the clear accounts rule as an answer to the whole of LMIM's claims for indemnity by reason of counter-liabilities of LMIM that arose at any time, but did not raise it in answer to the first applicants' direct payment claims.

[129] Mr Whyte relies on the claim made in proceeding BS11560/16 started by him as receiver of the FMIF in LMIM's name against LMIM in its personal capacity as a basis for the application of the clear accounts rule to LMIM's indemnity claim. The draft amended statement of claim alleges a significant number of breaches of statutory and equitable duties by LMIM.

[130] First, in paras 37 to 48 it is alleged that LMIM pre-paid management fees from the FMIF, when there was no authority in law to do so, from 1 July 2007 until 30 June 2013. The amount of the claim is not stated.

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65 (2011) 286 ALR 346, 351 – 352 [14] – [19].

66 (2011) 286 ALR 346, 353 [20].

[131] Second, in paras 49 to 59 it is alleged that LMIM paid amounts from the FMIF that were calculated by reference to the value of the scheme property when that property was overvalued, from the financial year ended 30 June 2009 to 26 July 2013. The amount of the claim is not stated.

[132] Third, in paras 60 to 91 it is alleged that LMIM caused loan management fees described as agency payments or management services agreements loan management fees to be paid to LMA from the property of the FMIF that were not authorised by the constitution, and were not expenses properly incurred, for the financial years ended 30 June 2011, 30 June 2012 and 30 June 2013 (including from 1 March 2013 to 30 June 2013). The total amount of the claim is $13,720,167 (including $983,359.63 for the period 1 March 2013 to 30 June 2013) plus interest.

[133] The relief claimed is for declarations of the relevant breaches of trust or contraventions of statute and that they caused loss to the FMIF to be assessed. As well, declarations are claimed that LMIM's right to be indemnified from the assets of the FMIF is limited to the balance between what LMIM would otherwise be entitled to by way of indemnity and the extent of LMIM's obligation to restore the losses caused to the FMIF by its breaches of trust or contraventions of statute. Finally, the relief is claimed for an adjustment of the account between LMIM and the FMIF to properly account for the liability of the FMIF to restore the property of the FMIF.

[134] It is not easy, or necessary in this case, to state the limits of the reach of the clear accounts rule. However, three relevant points as to its scope were raised in the present application that must be considered. First, Mr Whyte submits that where there is an unresolved counter-liability that would attract the operation of the clear accounts rule, a trustee's right to indemnity from the property of the trust for expenses is suspended as a matter of law.

[135] Second, LMIM submits that the clear accounts rule is only attracted where the breach of trust alleged against a trustee is of a "core" duty of a trustee and that the alleged counter-liabilities in the present case are not of that character.

[136] Third, both parties submit that the operation of the rule is not relevant to the liquidators' direct payment claim.

[137] In some quarters,[67] the clear accounts rule is seen as derived from the rule in *Cherry v Boultbee*.[68] A reasonable argument exists that it is either separable from or a sub-set of the principles[69] for which *Cherry v Boultbee* is often cited.[70] The Court of Appeal in *re Dacre, Whitaker v Dacre*,[71] without considering *Cherry v Boultbee*, acted on the footing that there was a long series of authorities that "a defaulting trustee cannot claim a share in the estate unless and until he has made good his default" and that the rule is based on the theory "that the [c]ourt treats the trustee as

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67 Leeming and Heydon, *Jacob's Law of Trusts in Australia*, 8 ed, 2016, 514.

68 (1839) 4 My & Cr 442.

69 See Derham, *Derham on the Law of Set-Off*, 661 ff, 664

70 Those principles are now accepted as derived from the earlier case of *Jeffs v Wood* (1723) 2 P Wms 128, rather than *Cherry v Boultbee*.

71 [1916] 1 Ch 344.

having received his share by anticipation",[72] meaning that the trustee is treated as already having received its share to the extent of the default. Modern statements do not gainsay those propositions.[73]

[138] In *RWG Management*, Brooking J considered and rejected an argument that a trustee was prevented from making a claim for indemnity for expenses against the estate until it has made good the loss to the estate from default, in the sense of payment of the amount of the default. Instead, he accepted that the counter-liabilities were to be applied (as if set off) against each other on the principle set out above, so that the trustee is entitled to any excess in its favour.[74]

[139] To the extent that the reasons of Gordon J in *Australian Securities and Investments Commission v Lettern and ors (No 17)*[75] suggest that the trustee's obligation to make good the default is a condition precedent to the right to an indemnity, in my view, they should not be taken as requiring anything more than the process of reducing the amount of the right by the amount of the counter-liabilities in accordance with the principle stated by Brooking J, as already mentioned.

[140] That may mean that the net amount of the right to an indemnity will not be capable of ascertainment until the amount of the loss caused by the breach of trust that is the basis of the counter-liability can be established. But that is a procedural matter, not an element of the right to indemnity or a matter of substantive defence. Hence, in my view, the statement of Young CJ in *Warne v GDK Financial Solutions Pty Ltd; Billingham v Parberry*[76] that the trustee has a prima facie right to indemnity but an order for accounts will be made if there is doubt about a default that suspends the right of the trustee while the accounts are taken is correct. This reflects how matters would have proceeded in an administration action in equity involving an allegation of breach of trust.

[141] Gordon J in *Lettern* accepted that a breach of certain "core" duties will as a matter of course result in a loss of the right to indemnity for an associated expense.[77] However, it is necessary to distinguish that statement from the operation of the clear accounts rule or the wider rule in *Cherry v Boultbee*. That statement was not concerned with either principle, but a trustee's right to indemnity for an expense incurred in connection with the postulated breach of a core duty. There is no principle that the operation of the clear accounts rule is confined to a trustee's right to indemnity for an expense connected with a breach of trust.

[142] Following these steps, in the present case, reduction of the amount of the right of indemnity by the amount of the claim for the counter-liabilities in proceeding BS11560/16 would exceed the amounts claimed by LMIM for payment for indemnity for expenses, even if the claim for indemnity were otherwise accepted as one made for expenses properly incurred by LMIM as trustee or responsible entity.

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72 [1916] 1 Ch 344, 346 – 347.
73 *Re Kaupthing Singer and Friedlander* [2012] 1 AC 804, 815 – 826.
74 [1985] VR 385, 397 – 398. See also *Fitzwood Pty ltd v Unique Goal Pty Ltd (in liq)* [2002] FCAFC 285, [138].
75 (2011) 286 ALR 346.
76 [2006] NSWSC 259, [194].
77 (2011) 286 ALR 346, 352 [17] – [18].

[143] It follows that the clear accounts rule operates to "suspend" the claimed right to payment from the assets of the FMIF until the resolution of that claim and that LMIM's indemnity claims, to the extent that they are otherwise maintainable, should not be finally resolved until the claim in proceeding BS11560/16 is resolved.

Liquidators' direct payment claim

[144] The first applicants claim an order for direct payment of the expenses incurred by them (as a mirror of LMIM's indemnity claims) from the property of the FMIF upon the principle of *re Universal Distributing Company Ltd (in liq)*,[78] or the principle of *re Berkeley Applegate (Investment Consultants) Ltd (in liq)*.[79] The first applicants make this claim as a means of avoiding the application of the clear accounts rule to LMIM's entitlement to indemnity from the property of the FMIF.

[145] I deal with the applicable principles of law in the Remuneration application and will not repeat them here.

[146] The first applicants do not contend that they are entitled upon the direct payment claim to amounts that were not expenses properly incurred by LMIM as trustee and responsible entity.

[147] Where I have determined that some of the expenses were not properly incurred by LMIM, no separate question arises as to whether those expenses can be claimed under the liquidators' direct payment claim. For example, the costs of the appeal do not fall to be considered under this basis of claim.

[148] The remaining claims that must be considered under this heading are for the following amounts:

Category Number	Description	Amount
2	Liability insurance premiums	$61,391.78
3	Legal costs relating to production of books and records	$25,480.42
4	Legal costs relating to assessment of legal costs	$11,477.43
5	Assessors costs	$6,279.86
Total		**$104,629.49**

Each of these amounts was for an expense incurred in relation to the winding up of the FMIF and is therefore an amount in respect of which LMIM is entitled to an

78 (1933) 48 CLR 171, 174; *Thackray v Gunns Plantations* (2010) 85 ACSR 144, [48]; *re Owen & ors* (2014) 225 FCR 541, 552.

79 [1989] Ch 32.

indemnity subject to the operation of the clear accounts rule. I will call these amounts the "expenses properly incurred".

[149] None of these amounts was paid or incurred for an expense that would be classified as a general expense of the liquidation.

[150] The first applicants submit that they are entitled to an order that the amounts be paid from the property of the FMIF on the basis of the principles in *re Universal Distributing Company Ltd (in liq)*[80] and *re Berkeley Applegate Investment Consultants Ltd (in liq)*.[81] It is appropriate to return to those cases, which I discussed in the Remuneration application, albeit briefly..

[151] In *Universal Distributing Co* a liquidator claimed remuneration and expenses. A debenture holder claimed priority to the assets in the hands of the liquidator. Notwithstanding the security of the debenture, it was held that an allowance was to be made to the liquidator for his costs of realising property in the winding up limited to the costs "reasonably incurred in the care, preservation and realisation of the property".

[152] The principles that informed *Universal Distributing Co* case and equity's imposition of an equitable lien in some other contexts were considered by the High Court in *Stewart v Atco Controls Pty Ltd (in liq)*.[82] The reasons of the court recognised that the question in *Universal Distributing Co* was whether a liquidator had an equitable lien for the realisation costs amounting to a charge in priority to a secured creditor's equitable charge. The circumstances to which the principle applied stemmed from the liquidator incurring expenses and rendering services in the realisation of assets.[83]

[153] In *Primary Securities Ltd v Willmott Forests Limited (recs & mgrs apptd)(in liq)*[84] The Court of Appeal of Victoria held that if a liquidator's expenses are incurred and services are rendered for the purpose of realisation, a charge could be created for those amounts even if they do not produce a fund to which the charge would attach, provided there is property that properly can be subjected to the charge.

[154] However, there are differences between such a case and the present. By statute LMIM is continuing in the role of responsible entity and trustee of the property of the fund. Mr Whyte is also appointed, with the responsibility to carry out many or most of the functions required to wind up the FMIF. But he does not have power or the functions to do all things. Nor does he have exclusive powers in all areas where he has power. These are incidents of a winding up of a managed investment scheme in accordance with the statutory provisions. The first applicant as liquidators must incur expenses in fulfilling their obligations as managers of LMIM in fulfilling its obligations in the winding up of the FMIF.

[155] *Berkeley Applegate* is in some ways more like the present case. The company in liquidation was a trustee of some assets held for investors comprising loans secured

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80 (1933) 48 CLR 171.
81 [1989] Ch 32.
82 (2014) 252 CLR 307.
83 (2014) 252 CLR 307, 320 [23].
84 [2016] VSCA 309.

by real property mortgages. It was also trustee of funds held for investors. The liquidator incurred expenses and sought remuneration relating to work done. The liquidator had undertaken work under the heads of (1) preliminary investigations, (2) inquiries from investors and borrowers, (3) ascertaining the assets and matching the records of advances and accounts, (4) managing the investments including recovery of arrears and redemption of some loan transactions and (5) general liquidation costs.

[156] Like the first applicants in the present case, the liquidator in *Berkeley Applegate* had no personal entitlement as trustee to an indemnity from the trust property. Any entitlement of that kind would have been the trustee company's entitlement.

[157] It was held that the authorities "establish a general principle that where a person seeks to enforce a claim to an equitable interest in property the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property."[85]

[158] Nothing in *Berkeley Applegate* suggests that the allowance was a right of the company as opposed to the liquidator's personal right. Later cases are consistent with the right and any associated equitable lien being personal to the liquidator.[86]

[159] However, in *re Suco Gold Pty Ltd (in liq*),[87] King CJ put the right to payment from trust property for a liquidator's remuneration and expenses in the winding up of a corporate trustee on alternative bases: first as debts of the company incurred in discharging the duties imposed by the trust covered by the trustee's right of indemnity;[88] second, on the principle of *Universal Distributing Co*.[89] The first of those bases is not a personal right of the liquidator.

[160] When the *Berkeley Applegate* principle is engaged, the right to an allowance by payment out of the trust property is a personal right of the liquidator. Accordingly, if the principle is engaged for any of the expenses properly incurred in the present case for which the fist applicants claim an entitlement to payment from the FMIF, they are not subject to any counter-liability owed by LMIM to the members as beneficiaries of the FMIF.

[161] Mr Whyte submits that none of the expenses that I have held were expenses properly incurred by LMIM as trustee is recoverable by the first applicants having direct recourse to the property of the FMIF because the expenses were not necessary.

[162] In my view, these factors are not preconditions to the first applicants' right to the order for payment out of the property of the FMIF for costs incurred and for skill and labour expended in connection with the administration of the trust property.

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85 [1989] 1 Ch 32, 50.

86 *13 Coromandel Place Pty Ltd v CL Custodians Pty Ltd (in liq)* (1999) 30 ACSR 377, 385; *re Sutherland; French Caledonia Travel Service Pty Ltd (in liq)* (2003) 59 NSWLR 361, 426-427; *re Owen & ors* (2014) 225 FCR 541, 550 – 552 [56] – [69].

87 (1983) 33 SASR 99.

88 cf *Owen v Madden (No 5)* (2013) 9 BFRA 99, 107 – 108 [46].

89 (1983) 33 SASR 99, 110.

[163] There should be an order that the expenses properly incurred are to be paid from the property of the FMIF.